

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

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Court : Allahabad

Decided On : Jul-23-2004

Reported in : 2005CriLJ161

Judge : M.C. Jain and ;K.N. Ojha, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 396; [Evidence Act, 1872](#) - Sections 9

Appeal No. : Criminal Appeal Nos. 1479, 1494, 1495, 1499 and 2072 of 1980

Appellant : Malkhan and ors.

Respondent : State of U.P.

Advocate for Def. : Sudhir Kumar Agarwal, A.G.A.

Advocate for Pet/Ap. : P.N. Misra, ;Apul Misra and ;S.K. Chaturvedi, Advs.

Disposition : Appeal allowed

Judgement :

M.C. Jain, J.

1. All these five criminal appeals arise out of the judgment and order dated 13-6-1980 passed by Sri R.C. Chaturvedi the then III Addl. Sessions Judge, Mathura in Sessions Trial No. 313 of 1979. This being so, they are being decided by this

common judgment. In Criminal Appeal No. 1479 of 1980 the appellant is Malkhan, Raj Pal is the appellant in Criminal Appeal No. 1494 of 1980, Vijai Singh and Khajan are the appellants in Criminal Appeal No. 1495 of 1980, Bachchan is the appellant in Criminal Appeal No. 1499 of 1980 and Choba is the appellant in Criminal Applicant No. 2072 of 1980. All of them have been convicted under Section 396, IPC and sentenced to life imprisonment by the impugned judgment.

2. The incident occurred in between the night of 29/30-6-1979 at about mid-night in village Beru alias Berua within P.S. Sahpau, District Mathura. An armed dacoity was committed at the house of Maharaj Singh P.W. 1 in which a girl Mamta aged about 12 years was murdered and Maharaj Singh P.W. 1 himself. Maharaj Singh's wife Laxmi Devi and Vijay Kumar Son of Ram Gopal were injured. The FIR was lodged by Maharaj Singh (P.W. 1) at the concerned police station on 30-6-1979 at 8 A.M. without naming anybody. The distance of the police station from the place of occurrence was 5 miles.

3. The number of bandits was said to be 10 or 11. The accused appellants came to light during the course of investigation and were put up for identification. The brief facts are that in between the fateful night, Maharaj Singh P.W. 1 and his family members were asleep in the house. A lantern was glowing in the Verandah. S.B.B.L. gun and the cartridges were on the cot of Maharaj Singh below his bedding. Suddenly, a lathi blow was dealt on his hand. As a result, he woke up and sat on the cot. He noticed two persons by the side of his bed with lathis. When he tried to take out his gun, one of the miscreants picked it up as also the case of cartridges. Somehow he opened the window and rushed outside the house. Another bandit was standing guard on the window outside and he gave him a lathi blow. He rushed towards the village Abadi raising shouts. Several villagers appeared on the scene including Shree Chandra P.W. 2, Vijai Kumar and Har Narayan with lathis and torches. Shri Chandra set fire to the heap of Karab kept outside Maharaj Singh's houses illuminating the entire area. The dacoits fired several rounds and 3-4 stood guard on the door. One of them stood guard at the house top and the rest engaged themselves in plundering the house, moving around, coming in and going out the house. The villagers who had licensed guns also fired some rounds from their respective houses to create a scare amongst the

dacoits. For about half an hour, the house of Maharaj Singh was ransacked whereafter the dacoits left with the booty. They were carrying country made pistols. Lathis and dandas and also took away the gun of Maharaj Singh. They were putting on shirts and trousers and in all they had fired 8 or 10 rounds. After the departure of the dacoits, Maharaj Singh went inside the house and learnt that the ladies had been assaulted during the commission of dacoity and his niece Km. Mamta aged about 12-13 years had been shot, dead. The FIR also stated that the miscreants had been seen in the light of the torches and burning Karab. After the departure of the dacoits within 10-15 minutes, two police constables, who were on patrol duty, appeared on the scene and some of the villagers went in search of the dacoits, but no trace was found. Their footsteps were noticed upto Parsoura Ka Bamba. The gun of Maharaj Singh taken away by the dacoits bore number 12493 S.B.B.L. Belgium. The bandits had taken away 26 cartridges also. On the lodging of the FIR a case was registered.

4. The investigation was initially taken up by Mahavir Singh Solanki P.W. 14. He reached the spot and Maharaj Singh P.W. 1 handed over the list of looted property to him. He held inquest on the dead body of Km. Mamta and despatched the same for post-mortem. He recorded the statements of Maharaj Singh P.W. 1, his wife Laxmi Devi, his sons Girish and Jagdish, nephew Vijai Kumar etc. The site plan of the place of occurrence was prepared. The injured were sent for medical examination. On 1-7-1979 S.O. Sahpau, Ram Kumar Singh Tyagi P.W. 12 reached the spot and took up further investigation.

5. All the six accused appellants were arrested by him on 25-8-1979 in the grove of Fate Ullapur near Dharamshala while they were busy distributing amongst themselves the booty. They were also allegedly found in possession of illicit arms and ammunition, as also the looted property of another dacoity: committed on 24/25-8-1979. These arrests were made at about 11 A.M. and their complicity in the present dacoity came to light on their interrogation. They were made Baparda on the spot and brought as such to P.S. Sahpau and lodged in lock up at 6.15 P.M. vide G. D. Report No. 22 dated 25-8-1979.

6. As per the post-mortem report of the deceased girl, she died of gun shot injuries. The injured Maharaj Singh, Vijai Kumar and Smt. Laxmi Devi were medically examined on 30-6-1979 at 2 P.M. 3 P.M. and 3.15 P.M. by Dr. Hari Babu Sharma P.W. 6 M.O. PHC, Sahpau. All of them sustained blunt weapon injuries. Smt. Laxmi Devi had also sustained an incised wound 1 cm. x 1/4 cm. on right ear lobule with lower part of ear lobule missing.

7. The test identification parades were arranged in District Jail, Mathura on 11-9-1979 which were conducted by Bhagwan Dass, Executive Magistrate, Mathura P.W. 13. The witnesses Maharaj Singh (P.W. 1), Shree Chandra P.W. 2. Girish P.W. 3 and Har Narayan (not produced) participated in the test identification parades Maharaj Singh P.W. 1 and Girish P.W. 3 picked up all the six suspects (accused appellants) and committed no mistake. It is not necessary to relate the performance of Har Narayan because he was not produced as a witness at the trial.

8. Shree Chandra P.W. 2 correctly picked out Choba, Malkhan, Rajpal and Vijai Singh suspect and committed one mistake in each of the test identification parades of Khajan and Bachchan accused. Thus his performance was about 67 per cent, but in Court he placed his hand on Vijay Singh, Bachchan. Malkhan and Choba i.e. he placed his hand on Bachchan while he ought to have placed his hand on accused Raj pal. Thus, he committed one mistake in Court and his overall correct performance went down to about 50%. He was held not to be a good witness of identification and his identification evidence was ignored. In our opinion, the trial Court rightly did so.

9. The defence was of denial and that they (accused appellants) had been shown to the witnesses before the test identification. The plea of having been photographed was also raised in their statements under Section 313, Cr. P.C.

10. Believing the prosecution evidence, the trial Court found the case to be proved and convicted the accused appellants under Section 396, IPC with sentence of life imprisonment to each of them.

11. We have heard Sri Apul Mishra representing all the accused appellants and Sri Sudhir Kumar Agarwal, learned A.G.A. from the side of the State in opposition of the appeals.

12. The argument of learned counsel for the accused appellants is that there was inordinate delay in holding of test identification parades, that the accused appellants had been shown to the witnesses before the test identification rendering it meaningless and that no recovery had been made from any of them. He reasoned that on the basis of weak and infirm evidence, the conviction is not sustainable. On the other hand, the learned A.G.A. tried to support the conviction with the submission that there were two good identification witnesses against the accused. He urged that the test identification did not suffer from any flaw or infirmity whatsoever.

13. The factum of dacoity and murder of Km. Mamta is not disputed. There is evidence on record to clinch this issue. The next question which comes for consideration is of the availability of light. The prosecution alleges that there was glowing lantern inside the house of Maharaj Singh and secondly, Shree Chandra P.W. 2 had set fire to the fodder (Karab). Further, Vijai Kumar (nephew of Maharaj Singh) was flashing a torch. In addition, the dacoits themselves were flashing 7 or 8 torches. The lantern was examined by the Investigating Officer at the spot. The torch of Vijay Kumar was also found in working condition. A crime like dacoity by its very nature could not have been committed in pitched darkness without the presence of adequate source of light which was necessary for criminals to carry out their operations, whosoever they were. After all the desperadoes being strangers had to find their way about and discover the whereabouts of articles and then sort them out which they intended to appropriate. The light was also needed by them to take precaution against any counter attack by the inmates and the villagers. The evidence is there that Maharaj Singh was an affluent person. It was natural that the glowing lantern was kept in the night. So the availability of light at the spot cannot be doubted.

14. However, on careful consideration of other evidence and circumstances emerging on record, we are of the firm view that all the appeals deserve to

succeed since the prosecution case suffers from inherent weaknesses. We intend to deal with them in succeeding discussion.

15. It has to be first pointed that in the FIR no description of the features, built-up, height, gait etc. of the bandits was given. Secondly, it was a very unusual feature of the case that 55 days after the incident (on 25-8-1979), all the six accused appellants were allegedly apprehended by the Investigating Officer at one spot snaring looted booty. The arrest of all of them together is unusual coincidence which is hard to believe. Further, it sounds to be unnatural that they would have been keeping the booty with them for about 55 days after committing this crime, to be shared amongst themselves at the time of alleged arrest by the Investigating Officer on 25-8-1979 at about 11.00 A.M.

16. It is further to be taken note of that no part of the booty recovered from the accused appellants was produced at the trial. Nor was the recovery subjected to identification.

17. Another strange feature of the case is that though they were allegedly arrested on 25-8-1979 at 11 A.M. by R.K.S. Tyagi, S.O., P.W. 12, but they were lodged in lock up of the police station as late as 6.15 p.m. that day. They were taken out from the police lock up on 26-8-1979 at 8.50 A.M. and were taken to the Court by Constable Parsadi Lal P.W. 7. The distance of Sahpau from Mathura is only 60 kms and there is regular bus service as per the statement of Parsadi Lal P.W. 7. Yet, he took time upto 4 P.M. to cover the distance of 60 kms. The explanation offered is that the bus went out of order and he had to shift in another bus and could reach the Court at 4 P.M. But they were ultimately lodged in jail in mid-night. The explanation of the constable is that the remand Magistrate was not available in Court, it being Sunday and he approached Chief Judicial Magistrate who, too was not available at his residence. He could contact him at Krishna Janam Bhumi. This cock and bull story is incapable of inspiring judicial confidence. Obviously, long time intervened between the alleged arrest of the accused appellants and their lodging in jail leaving great possibility of their being falsely implicated in this case after being shown to the witnesses. Maharaj Singh P.W. 1 and Girish Kumar P.W. 3 are the father and son. The distance of Sahpau from the village of the

incident was only 2 kms as stated by Maharaj Singh. There was every possibility of the accused appellants being shown to the witness Maharaj Singh P.W. 1 and Girish Kumar P.W. 3. Their performance being 100% was too good to be believed.

18. Girish Kumar P.W. 3 was aged about 12 years at the time of his testimony before the Court. It also sounds to be doubtful that a child witness Girish Kumar P.W. 3 had the opportunity to see and recognise the culprits. He says that he was sleeping with his brother Jagdish on a cot in his Verandah nearby the cot of his father. According to him, he saw the miscreants in the light of lantern and torch being flashed by the miscreants. He saw his father escaping through the window when he woke up. He kept sitting on his cot. The miscreants then went to the cot of his mother and took her with them to the other Verandah. They did not thereafter return to the Verandah in which he was sitting on a cot. They did not harm him at all. It is significant to note that bandits killed a girl Km. Mamta aged about 12 years during the commission of the dacoity. Obviously, she was incapable of offering any meaningful resistance to them. But, merciless as they were, they killed her by shooting. Then, it does not stand to reason that they would have allowed this witness Girish Kumar P.W. 3 to keep sitting on the cot silently and watching their operations. It is equally unbelievable that in terror-stricken situation, he was courageous enough to keep control over his wits and to fix up images of the desperadoes in his mind to identify them as late as on 11-9-1979. His 100% performance at identification parades was eloquent of the fact that the accused appellants had been shown to him after they were arrested. May be, they were photographed also and photographs were supplied to him as well as to his father to facilitate their identification at the test identification parades.

19. The Supreme Court has held in the case of *Soni v. State of Uttar Pradesh* (1982) 3 SCC 368 that the delay of 42 days in holding test identification parade is fatal to the prosecution. In the present case, the incident took place in between 29/30-6-1979, the accused appellants were allegedly apprehended 55 days later on 25-8-1979 and were put up for test identification 17 days thereafter on 11-9-1979. Thus, there was a gap of 72 days between the happening and the test identification, practically rendering it meaningless. It has to be recalled that there is no other circumstance in the form of recovery etc. to connect the accused

appellants with this crime. It is for all these reasons that it is not possible to uphold the conviction of the accused appellants and their sentence under Section 396, IPC. No doubt, the crime of dacoity with murder was committed as alleged by the prosecution, but it is not at all established that the accused appellants were participants of this crime.

20. Resultantly, we allow all these appeals and set aside the conviction and sentence of life imprisonment passed against the appellants by the Court below. They are acquitted. They are already on bail.

21. The judgment be immediately certified to the lower Court for necessary entries in the relevant register and reporting compliance to this Court within two months from the date of receipt of a copy of this order.

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