

Shiv Prasad and ors. Vs. State of U.P.

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Court : Allahabad

Decided On : Sep-19-2001

Reported in : 2002CriLJ608

Judge : S.K. Agarwal, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 307, 392 and 397; Code of Criminal Procedure (CrPC) - Sections 110 and 161

Appeal No. : Crl. Appeal No. 2147 of 1980

Appellant : Shiv Prasad and ors.

Respondent : State of U.P.

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : J.P.N. Raj, Adv.

Disposition : Appeal allowed

Judgement :

S.K. Agarwal, J.

1. This appeal by three appellants, namely Shiv Prasad Sadhu Saran and Tarkeshwar, arises against their conviction and consequent sentence under Section 392 read with Section 397, I.P.C. to 7 years R.I. passed by the III

Additional Sessions Judge, Basti, on 22-9-1980.

2. The brief facts of the case are that the informant along with his Phuwa, Smt. Genda Devi started from her Sasural (in-laws house), village Dugduiya, P.S. Sahjanwa, District Gorakhpur to her parental house situated in village Karaunda, P.S. Bakhira, District Basti. He was walking on foot with his Phuwa from Newasey crossing. When he reached near Karaunda Pokhar (Pond) at about 8.30 p.m., three persons accosted them. They are appellants abovesaid. They had taken away the Jewellery and the clothes that this Phuwa was possessing on the strength of knife and Katta. The incident was witnessed by Ajay son of Satyanarayan, Kuber son of Ramroop, Ram Niwas Pathak son of Jamuna and Sadhu Saran Singh son of Pashupati Nath of his village and Brijlal Singh and many other villagers, who came to the spot flashing their torches. They had witnessed the incident and also recognised the miscreants in the light. In the robbery a gold chain a pair of golden ear rings a pair of silver Payal, Rs. 200/- cash and clothes were taken away. The report of the incident was lodged by Man Singh at P.S. Bakhira at about 10.30 p.m. The distance of police station from the village of occurrence was 7 Kins.

3. The prosecution in support of its case has examined five witnesses in all. Out of them PW 1 Man Singh, PW 2, Smt. Genda Devi and PW 3 Kuber Singh are the witnesses of occurrence. PW 4 Prem Nath is the Constable Clerk, PW 5 Lallan Sharma, S.L. is the Investigating Officer.

4. The defence: has examined DW 1 Daya Shankar Yadav, Constable, The defence has denied the prosecution story and claimed their false implication on account of preexisting enmity between the informant and the accused.

5. According to appellant Shiv Prasad, who was arrested on the very next morning at the early hours by the police party, has stated in his defence that S.O. Lalta Prasad, Constable Gulab Singh, Man Singh, Kodai Singh, Ishwari Prasad alias Patthar Rai and Bidya Rai had all attacked his house and assaulted with firearms him and his uncle Nar Singh and in their defence this false case was cooked up.

6. Appellant Sadhu Saran has stated that Kodai Tewari r/o of Dhedhuhi was his real Phupha. He was murdered. In that murder Gulab Singh and Man Singh were accused. He was doing Pairvi on behalf of his Phupha Kodai Tewari and, therefore, he has been falsely involved. He is Conductor in Roadways for the last 12 years.

7. Appellant Tarkeshwar has not raised in defence any plea.

8. So far as the statement of P.W. 1 Man Singh is concerned, the animosity with the appellant Shiv Prasad is admitted by him. He has stated that at the time of robbery they were raising alarm, but the accused persons were threatening them, their alarm attracted Ajay, Kuber, Ram Niwas, Sadhu Singh, Brijlal Singh and residents of the vicinity. First four witnesses belong to his village. They were coming behind them at a distance of 40-50 steps. The accused persons ran towards west. The witnesses came from the east. They were flashing their torches. The report was transcribed by him at his house. It is Ext. Ka-1. He along with Gulab and Kodai went to police station. It is 2 Kose (4 miles) from his house. He admits the presence of Lalta Prasad Tripathi, S.H.O., and Lallan Sharma at the police station and claims that he had shown his report to them and thereafter had given the report to the Constable Clerk. The police party followed them to his village. Statements of this witness, Gulab and Kodai were recorded by the police at the police station. On reaching the village the S.I. recorded the statements of Ajay; Kuber and P.W. 2 Smt. Genda Devi. From there he, Gulab Singh and Kodai Singh accompanied by the police party went to village Baair Biyas, which is at a distance of 1 Km. This is the village of appellant Shiv Prasad and Tarkeshwar. Arrest of Shiv Prasad was made, but no search of his house was conducted because of some quarrel between the arresting party and the appellants' party. He could not explain as to why the two petticoats and a blouse are not written in his report., He had admitted that in his report he had not specified the weapons possessed by any of these appellants, but tried to explain that he might have forgotten to describe the weapons individually against these appellants because of fear. It was told to the I.O. and if it is not written in his statement, he cannot offer any explanation. He has admitted that he along with Gulab Singh was accused in a murder case of Kodai Tewari . He further admitted that in the murder of Manik

also Gulab Singh was accused, but they were acquitted in those cases. In a case under Section 307 I.P.C. also he was an accused, but was acquitted. The victim of the robbery is a sister of a Pattidar of his is admitted to him. He claimed that if there is none in the family of his Pattidars to call any of their relations, he used to go to fetch them. According to him, in connection with the marriage in the house of a Pattidar. Gulab Singh fell ill and was unable to walk. Therefore, he had gone to call his sister Smt. Genda Devi. He further alleged that 15.20 days after the occurrence Gulab Singh was fully fit. Before that he could only walk a little. It is pertinent to mention here that this very Gulab Singh accompanied them for the arrest of Shiv Prasad. It is apparent from his statement that there is another route for his coming to the village, adjacent to the canal. But his explanation is that on that day the road was filled with water and, therefore, he had chosen the road on which the robbery was committed. He has denied that through Deo Singh there is a straight road to go to village Serikar. The place of his residence is 4 furlong only as this fact is admitted to the I.O. He has also denied that from Deo Singh to Serikar there is any straight route. He has admitted that Genda Devi's brother Gulab Singh had accompanied him to the police station for lodging the report. The I.O. has obtained their signatures on their statements. He has pleaded about lapse of memory to the question that his father Dulare Singh appeared as a witness against the father of appellant Shiv Prasad and his uncle in 1962. He had denied the suggestion that against Ram Naik his father had appeared as a witness in a case under Section 110 Cr. P.C. in 1959 and father of Shiv Prasad appeared as a defence witness. Similarly to some other suggestions of this nature to prove the enmity, they were admitted or denied. He has refuted the defence suggestion that they had gone to commit dacoity in the house of Shiv Prasad but because of resistance they failed and this false case was cooked up on that account against Shiv Prasad. He has denied that Lalta Prasad Tripathi, S.H.O., is on visiting terms with him and Gulab Singh.

9. From his cross-examination it is apparent that he does not know Tarkeshwar. He claimed knowing Sadhu Saran through his brother Goli. He did not disclose the name of Sadhu Saran's father. Sadhu Saran visited his village 6/7 years ago for once only. He admitted that he never visited village Newas, the place of residence of Sadhu Saran. The place of occurrence was surrounded by mango trees from all

sides, except east. The Jewelleries were taken out by the miscreants themselves and they were not handed over to them by Smt. Genda Devi. Genda Devi fell down, rather she was pushed by Tarkeshwar. She had suffered injuries in the process, but no injury of her was shown to the I.O. nor she was subjected to any medical examination. This fact is not transcribed even in the F.I.R. nor disclosed in his statement to the I.O. The miscreants, according to him, were open faced. He has denied the defence suggestion that on account of animosity with Kodai Tewari this appellant Sadhu Saran was involved by them. He has admitted that there was no source of light, but the night was bright. No other witness has said so. He has further stated that the report was transcribed by him at his house. He has very clearly admitted that the witnesses had arrived at the scene of occurrence after a little while and by that time the miscreants were fleeing from the spot. He has been corroborated by Smt. Genda Devi. She has also stated that there was no source of light. She has not given out that the night was bright as alleged by Man Singh. To disclose the identity of Sadhu Saran, she claimed that she remembered that he was a Conductor. Seeing Shiv Prasad she said that she is not able to recollect his name but he was also amongst the miscreants. She has given the details of the weapon with which the miscreants were armed with, but this fact did not find place in her statement to the I.O. She had further stated that Sadhu Saran brandished his Katta on Man Singh and Shiv Prasad and Tarkeshwar robbed her by brandishing knives. She had very clearly stated that due to fear and threat extended by the accused she and Man Singh did not raise any alarm. When the miscreants started running away only then they started raising alarm, which attracted the witnesses to the spot, meaning thereby that the witnesses could not see the miscreants by their faces. At the most they had been them, if at all, from their back. They came back to their house along with the witnesses. The I.O. came to her house and made enquiry from her. She had admitted that from the place of occurrence her village is about 1 Km. and Baair Byas falls at the turn of the road. She has stated that she has disclosed to the I.O. that two sets of clothes were also robbed by the miscreants and if it is not shown in her statement she cannot offer any explanation. She further stated that she had disclosed the weapons of the miscreants, but if it is not in her statement to the I.O. she cannot give any reason. According to her the report was written at the tank of Kodai Singh. She was also

there and after transcription of the report she went to her house. This is contrary to her examination in chief as well as to the statement of Man Singh. According to Man Singh the F.I.R. was written in consultation with Kodai Singh and others at his house. She had stated that she had suffered some injury on her neck as a result of pushing by Tarkeshwar, but, as earlier stated, neither her injuries were examined by the I.O. nor she reported any injury to I.O. in her statement. She was not sent for age (sic) medical examination. This is a serious discrepancy in the prosecution case. The version appears to have been improved later on during trial in order to make it a case of robbery and snatching of the jewellery from her person. She did not say that she had come to her village on account of ailment of her brother. From the spot of occurrence, she immediately started for her house, which means that she had no conversation with any of the witnesses. She had given a reason for knowing Sadhu Saran. According to her in village Serikar a market is held and also a school is there and boys of Nawasey are studying in the village school and the people of Nawasey also visited the market. She had admitted very clearly that except that except Sadhu Saran, she does not know any other person of that village. She was married long ago she was not living therefor long. This clearly indicates that it is hard to believe that she knows even Sadhu Saran. Therefore, the nomination of Sadhu Saran in her statement and also in the Court was on the basis of prompting by the witnesses and the prosecution. From her statement it is difficult to believe that she knew Tarkeshwar also, who is a Conductor for last several years in the Roadways. Thus from the statement of these two witnesses it is apparent that there is improvement in their case with regard to Genda Devi suffering injuries, but this is belied by absence of any medical examination or even examination by the I.O. and any note in the case diary about her injuries. They had also made improvement with regard to the weapons individually possessed by the accused persons. Man Singh has not stated that pistolwala had pointed his pistol on him. This witness (P.W. 2) was made to state that. This witness (P.W. 2) has also admitted that the report was not transcribed by Man Singh at his house, but it was transcribed at the tank of Kodai Singh. This fact was in contradiction with what P.W. 1 Man Singh. Admittedly the report does not bear any fold marks which means that it was not folded while it was taken to the police station. This is a typical situation which shows that the F.I.R. was not carried to the police station

but in all probability was handed over to the I.O. at the spot on his arrival or was prepared at the police station subsequently. According to these two witnesses the clothes and the money was kept in a plastic basket which were taken away by the miscreants is quite contrary. P.W. 3 Kuber Singh had stated that it was in a cotton bag. The other fact which had occurred in the testimony of this witness and the I.O. is also crucial that they had gone along with Kodai Singh, Gulab Singh and Man Singh to the village of Shiv Prasad. Their case is that they had gone to arrest the culprits but they could only apprehend Shiv Prasad though they failed in searching his house since there was a resistance. Presence of Shiv Prasad at his house at 4.00 a.m. is a circumstance which creates serious doubt in the authenticity of the prosecution story regarding his participation in the incident. Why no search was conducted in the house of Shiv Prasad and no property was recovered is also not at all explained by the prosecution. The explanation admitted to by the prosecution is palpably false. As a matter of fact the robbery may have taken place but due to darkness, in all probability, the assailants could not be identified or the fact that they were covering their faces cannot be ruled out and as a matter of suspicion the police party had raided in company with Kodai Singh, Gulab Singh and Man Singh the house of the appellant Tarkeswar and Shiv Prasad, which resulted into a scuffle between the police party and the witnesses on the one hand and the villagers on the other, which also creates serious doubt in the authenticity of the prosecution story of arrest of Shiv Prasad. There is yet another circumstance. According to P.W.1, Gulab Singh was not in a position to walk properly. He was ailing. Still he had accompanied P.W. 1 to police station along with Kodai Singh and thereafter both of them accompanied the police party along with Man Singh to arrest Shiv Prasad. This is a circumstance which belies the statement of P.W. 1 that Gulab Singh was ailing and for that reason he had gone to call his sister P.W. 2 Genda Devi. This also raises a question about the authenticity of commission of offence. Therefore, I am not prepared to accept the testimony of these two witnesses of robbery and identification accused by them.

10. Coming to the testimony of P.W. 3 Kuber Singh, I find that he cannot witness the incident. It has nowhere been stated in the F.I.R. or Section 161 Cr. P.C. statement that he was following them at some distance along with others and hearing their alarm he had rushed to the spot. Admittedly, according to the

statement of P.Ws. 1 and 2 both these witnesses had arrived at the scene of occurrence when these appellants had already taken to their heels. At best they could be seen by these witnesses from their back. They were at some distance from the witnesses when they reached the spot in different direction. The place of occurrence was surrounded by mango trees and for this reason there will be complete darkness even if it is a bright night (moonlit night). The incident had taken place in the thick of these mango trees. For these reasons the statement of this witness is not reliable. His presence is alleged due to his being a collateral of Man Singh.

11. The promptness of the investigation in the present case is also an issue to be examined. The police claimed to have reached the spot at about 1.30 A.M. The report was lodged at 10.30 P.M., as alleged by the prosecution. Normally the police could not have been to the spot so promptly. There is nothing on record to show why they arrived at the scene of occurrence so promptly when it was a case of small robbery. Apart from this the fact, as admitted by P.W. 5 that they went to the place of Kodai Singh and thereafter arranging the light they promptly recorded the statements of these witnesses. He did not say that any statement of Genda Devi, Kodai Singh and Man Singh was recorded at the police station. He claimed that he had gone to the spot to apprehend the culprits and recover the property, but why the property was not recovered despite arrest of Shiv Prasad raises a doubt in the truth of its case. He has admitted that some of the facts about the injury of the victim of robbery and specifications of the weapons etc. were not disclosed to him by these two witnesses (P.Ws. 1 and 2). Kodai Singh accompanied them with his licensed Gun. The defence case is that they had attacked the house of Shiv Prasad and the villagers had resisted that Fires were discharged there. It does not appear to me to be an absolutely false story. All the Parchas of the case diary were received at the office of C.O. 4/5 days later. No entry is there in the office of C.O. about receipt of these papers, although, admittedly, according to D.W. 1, entries are made in the register maintained at his office. He had brought the special report in regard to Crime Nos. 69 of 1980 and 70 of 1980 of P.S. Bakhira. He had admitted that first Parcha of Crime No. 69 of 1980, which is the crime number of the present offence, dated 23-4-1980 was received in his office on 25-4-1980. The second Parcha dated 24-4-1980 was

received on 26-4-1980, the third Parcha dated 26-4-1980 was received on 29-4-1980, and the last Parcha dated 27-4-1980 was received on 29-4-1980. Similarly Parcha of Crime No. 70 of 1980 dated 24-4-1980 was received on 26-4-1980, the second Parcha dated 25-4-1980 was received on 28-4-1980 and the third Parcha dated 5-5-1980 was received on 8-5-1980. Thus, it is apparent that these Parchas were regularly sent belatedly from the police station to the Circle Officer deliberately.

12. In the above set of facts and the discussion made in the judgment, I feel the testimony of these witnesses does not deserve any reliance. Probability that they were involved on account of bad blood of the yesteryears cannot be ruled out.

13. For the reasons discussed above, this appeal is allowed. The conviction of these appellants under Sections 392/397 I.P.C. is set aside. They are on bail. They need not surrender. Their personal bonds are cancelled and sureties are discharged.

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