

Sunil Alias Sushil Kumar Vs. State of U.P.

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Court : Allahabad

Decided On : Sep-10-2004

Reported in : 2005CriLJ1357

Judge : M.C. Jain and ;K.K. Misra, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 386; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Crl. Appeal No. 2508 of 1980

Appellant : Sunil Alias Sushil Kumar

Respondent : State of U.P.

Advocate for Def. : A.K. Bhatt and ;K.P. Shukla, A.G.As.

Advocate for Pet/Ap. : Virendra Saran, Adv. and ;K.D. Tripathi, Amicus Curiae

Disposition : Appeal allowed

Judgement :

M.C. Jain, J.

1. Both these appeals challenge the judgment and order dated 5th Oct. 1980 passed by Sri T.P. Gupta, the then V Additional Sessions Judge, Kanpur in Sessions Trial No. 287 of 1980. As such, they are being decided together. The

appellant in Criminal Appeal No. 2508 of 1980 is Sunil alias Sushil Kumar whereas Shahzade is the appellant in other Criminal Appeal No. 2524 of 1980. Both of them have been convicted under Section 386, IPC and sentenced to undergo life imprisonment. Two others, namely, Devendra Kumar and Munnu alias Radhey Shyam were also tried with them, but they were acquitted being given the benefit of doubt. There was yet another suspect of the offence, namely, Rais Ahmad, but he was not charge-sheeted as no witness had identified him at the identification parade.

2. The background facts which led to the trial are as follows. The incident took place in between the night of 13/14th March, 1980 at about 1'o clock in village Kushwaha Nagar, within P. S. Kalyanpur, District Kanpur and the FIR was lodged on 14-3-1980 at 3.30 a.m. by an eye witness Ramesh Chandra PW-2 (injured). Nobody was named in the FIR. In fateful night, Ramesh Chandra PW-2 was sleeping in the room of his house situated in village Kushwaha Nagar. A lighted lantern was there. In front of his house, there was a street electric pole on which a bulb of 200-W was glowing as the rod fixed thereon had gone out of order. There was a Chhappar in front of his house under which his father and one Kishan Narain were sleeping on one cot. The other inmates of the house were sleeping in the room in which he was sleeping and his mother was sleeping in another room. At about 1'o clock, his father got up on hearing some rattling sound. Ramesh Chandra opened the door of his room and through the Junglaq (window) fixed in the wall, he saw that there were 4-5 dacoits standing near his father. They were having country-made pistols, knives etc. They were threatening his father and Kishan Narain that they would be killed if they raised any alarm. At the same time, he saw two dacoits at the roof of his house. He went inside the room and chained the door from inside. The dacoits who were at the roof jumped down in the Sahan and opened the door of Sahan. 5-6 other dacoits came inside. They broke open the door of the room of Ramesh and barged inside. They opened the door of this room opening in the outer Varandah with the result that the dacoits started coming in and going out. In total, there were 8-10 dacoits. They looted the property from the house. Somehow, Kishan Narain ran out and raised an alarm upon which the witnesses Babu Lal and Shiv Mangal also came there. Babul Lal was fired at by the dacoits near the wall in the western side of the room of Ramesh. Shiv Mangal

was also injured by knife etc. under the Chhappar.

3. There was the house of Gurucharan PW 3 in the eastern side of the house of Ramesh. On hearing the alarm, he himself and his two sons Pramod Kumar and Ambika Prasad went upstairs on the roof and seeing that one of the dacoits was at the roof of adjoining house of Ramesh, one of his sons threw a brick bat towards the dacoits, whereupon the dacoit opened fire causing injuries to Pramod and Ambika. Thereafter, Gurucharan PW 3 brought them down in the outer room of his house. In this outer room, there was window towards the western side through which everything was visible under the Chhappar and outside the house of Ramesh. Through this window, Gurucharan saw the dacoits committing dacoity in the light of street electric pole as well as the light of torches. There was also the light of burning sugarcane leaves lying in front of the house of Ramesh in the corner of the field. The dacoits ransacked the house for about half an hour and during their operations, they injured Ramesh also. After looting the property, they came out and went away towards the northern side. However, they were seen by the witnesses in the electric light coupled with the light produced by the burning of sugarcane leaves. That apart, Ramesh saw them in the light of the lantern which was there in his room on the table. When the dacoits decamped, the injured Babu Lal, Shiv Mangal, Pramod etc. were taken to the hospital. Ramesh P. W. 2 also accompanied them. By the time they reached the hospital, Babu Lal succumbed to his injuries. Shiv Mangal was admitted in the hospital but he also died subsequently. Injuries of Ambika Prasad and Pramod were also medically examined in the hospital.

4. Ramesh got a report written by Sadhu Ram in the hospital and carried them to the Police Station Kalyanpur on the basis of which a case was registered. Investigation was handed over to S.I. Daulat Ram Pal P. W. 6. The injuries of Ramesh were also medically examined on 14-3-1980 at 12.05 p.m. by Dr. V.K. Srivastava P. W. 10.

5. Skipping unnecessary details, it may be stated that post mortem over the dead body of Shiv Mangal was conducted on 15-3-1980 at 2.50 p. m. by Dr. B.K. Srivastava P. W. 5. Post mortem on the dead body of Babu Lal was conducted on

14-3-1980 at 3.30 p.m. by Dr. Harish Chandra P. W. 11.

6. The accused appellants figured during investigation and were put up for identification. The identification was conducted by the then Executive Special Magistrate, Kanpur Sri D.P. Tapaliyal P. W. 1 on 14-4-1980. On the basis of identification, the two accused appellants with two others were charge-sheeted and tried as mentioned earlier. The trial culminated in the conviction of the present accused appellants with acquittal of two others.

7. The defence was of denial and of false implication.

8. In Criminal Appeal No. 2508 of 1980 Sri K.D. Tripathi, Advocate was appointed as amicus curiae to argue out the appeal on behalf of Sunil alias Kumar. In connected Criminal Appeal No. 2524 of 1980, Sri Vinay Saran Advocate was appointed as amicus curiae who argued on his behalf . We have heard the arguments of both of them as also Sri K.P. Shukla, learned A.G.A. from the side of the State. Record has been perused.

9. Post mortem reports of the two deceased and the injury report of Ramesh Chandra informant P.W. 2 have been proved on record. The factum of dacoity with these two killings is amply proved by medical evidence and the eye witness account of Ramesh Chandra P.W. 2, his brother Rajendra Prasad P.W. 4 and neighbour Gurucharan P.W. 3. Ramesh Chandra P.W.2 is himself the injured of the incident who sustained injuries in the form of incised wound, abrasion and contusion. He and his brother Rajendra Prasad P.W. 4 were in mates of the house where the incident occurred and their presence cannot at all be doubted. So is the case with Gurucharan P. W. 3 also who resided in the immediate neighbourhood of the house of the incident.

10. The submission from the side of learned counsel for the accused appellants is that the conviction was totally based on identification and since it was less than 60%, they were entitled to be acquitted. It has been stressed that no recovery of looted property had been made from any of them. We note that Ramesh Chandra P. W. 2, Gurucharan P. W. 3 and Rajendra Prasad P. W. 4 appeared as eye witnesses of the incident before the Court at the trial. Ramesh Chandra P. W. 2

correctly identified the accused appellant Shahzade, the accused appellant Sunil alias Sushil Kumar and Devendra Kumar (acquitted). He committed two mistakes in the identification parade of Munnu alias Radhey Shyam (acquitted) and Rais Ahmad (not charge-sheeted). Thus, his performance in the identification was correct to the extent of 60%. Gurucharan P. W. 3 correctly identified the accused appellants Shahzade, Sunil alias Sushil Kumar and Munnu alias Radhey Shyam. He, however, committed one mistake in the identification parade of Rais Ahmad. Thus, his performance works out to 75%. Rajendra Prasad P. W. 4 correctly identified the present two accused appellants and committed one mistake in the identification parade of Rais Ahmad. Thus his performance works out to 67%. It is fact that no recovery was made from any of the accused appellants.

11. Needless to say, one of the important questions that arises in a case based on identification evidence is as to what were the errors committed by a particular witness produced in Court. The errors are material for judging the memory and power of observation of the witness concerned. State of light at the time of dacoity, condition of eye sight of identifier, state of mind and opportunity of seeing the offender and any special conduct or outstanding feature of the offender noticed by the witness are other important factors to be taken note of in founding conviction on identification evidence. In the case of Venkuntam Chandrappa v. State of Andhra Pradesh, AIR 1960 SC 1340 : (1960 Cri LJ 1681), the Supreme Court relied upon the evidence of witness who had correctly identified two accused and made one mistake, meaning thereby that 66% correct identification at the identification parade was held sufficient for rendering the witness to be reliable.

12. It is, however, worthy of notice that for sustainable reasons, the trial Court held that Rajendra Prasad P. W. 4 was not in a position to see the miscreants. He was the brother of Ramesh Chandra P. W. 2 and was said to be sleeping in the same house in the night of occurrence . However, his name was not mentioned in the FIR. Nor was his name mentioned by Ramesh in his statement in the Court. Rajendra Prasad P. W. 4 stated that, in fact he had opened northern door of Sahan while according to Ramesh it was opened by the dacoits. Rajendra Prasad P.W. 4 also stated that he was sleeping in the room with his, wife, sister etc. It was not corroborated by the statement of any other witness. He further stated that,

after coming out, he remained standing under the Chhappar for about 15-20 minutes, watching the operations of the dacoits. In our opinion, it was not possible. The prosecution version was that the dacoits had even resorted to firing. They were also in the same Chhappar. Rajendra Prasad P. W. 4 did not take shelter behind anything to conceal his presence. He would not have ordinarily been allowed by the dacoits to remain there and to watch operations. So his evidence concerning the identification of culprits has rightly been rejected.

13. The trial Judge has, however, convicted two accused appellants on the testimony of Ramesh Chandra P. W. 2 and Gurucharan P. W. 3. We do not agree with his approach. It is pertinent to state that a weak identification evidence of a witness cannot be buttressed by similar weak evidence of another identifying witness. Taken individually, the performance of Ramesh Chandra P. W. 2 was 60% and that of Gurucharan P. W. 3 it was 75. This way, Gurucharan P. W. 3 alone could be accepted to be a good identifying witness against the accused appellants. The problem is that the performance of Ramesh Chandra P. W. 2 being only to the extent of 60%, he could not be accepted to be a good identifying witness and for practical purposes, his identifying testimony is meaningless and has to be rejected. It cannot be made use of to support the testimony of single eye witness, namely, Gurucharan P. W. 3. The truth of the matter is that there was a single identifying witness against the accused appellants, namely, Gurucharan P. W. 3 whose performance was 75%. The fact is, however, that there is no other circumstance to connect the accused appellants with this crime as participants of this dacoity. It may be stated at risk of repetition that no part of looted property was removed from any of them and the case against them solely rests on the testimony of identification sans any other incriminating evidence.

14. It is also worthy of notice that in the FIR no description of the height, built up, features etc. of the dacoits had been given. We also note that in the Court also, nothing came to be stated by any witness about any special conduct of the accused appellants during the commission of this offence.

15. To cap all these shortcomings, the recital of the FIR gives an indication that there could be the possibility of the present two accused appellants being booked

on suspicion. Both the accused appellants are residents of Kakadeo, just nearby the place of incident. It has been admitted by Ramesh Chandra P. W. 2 in his cross-examination that Kakadeo started at a distance of 1/2 miles from his house. The FIR states that on 11-3-1980 some boys had plucked sugarcane from the field of Gurucharan P. W. 3 whereupon a quarrel had ensued. The boys who had plucked sugarcane from the field of Gurucharan P. W. 3 had issued threats. They belonged to Kakadeo and issued threat that they belonged to the group headed by Shabban of Kakadeo and they would avenge themselves. A suspicion was expressed in the FIR that those persons could not be involved in the commission of this crime. We note from the statements of accused appellants recorded under Section 313, Cr.P.C. that both of them accepted to have plucked sugarcane and that a quarrel had taken place. So, the possibility cannot be ruled out that accusation against the two accused appellants was woven on suspicion. To say in other words, proceeding on the foundation of suspicion laid in the FIR, they were rounded up and put up for identification to be ultimately booked for trial on the basis of the result of the performance of the witnesses at the identification parade.

16. To conclude in a nutshell, out of three identifying witnesses, testimony of Rajendra Prasad P. W. 4 concerning identification was liable to be rejected. He could be believed only on the factum of dacoity having taken place that night in his house. But he was not in a position to see the dacoits. Out of remaining identifying witnesses, only one, namely, Gurucharan P. W. 3 could be taken as good identifying witness because his performance was 75%. But the performance of the one, namely, Ramesh Chandra P. W. 2 being only 60%, his testimony also was liable to be rejected because his performance was not upto mark. His performance of 60% could not be made use of to support the testimony of the only identifying witness Gurucharan P. W. 3.

17. The result is that the case against the accused appellants was based only on the testimony of one good identifying witness, unconnected by any recovery etc. The background of suspicion, related above, gives another jerk to the prosecution case. In our considered view, conviction of the accused appellants recorded by the lower Court is not sustainable. We would therefore, allow the appeals.

18. Both the Criminal Appeals No. 2508 and 2524 of 1980 are allowed. The order of conviction and sentence recorded by the learned trial Court is set aside. The appellants Sunil alias Sushil Kumar (appellant in Criminal Appeal No. 2508 of 1980) and Shahzade (appellant in Criminal Appeal No. 2524 of 1980) are hereby acquitted. They are on bail.

19. Sri K.D. Tripathi learned amicus curiae who argued Criminal Appeal No. 2508 of 1980 and Sri Vinay Saran who argued Criminal Appeal No. 2524 of 1980 shall get Rs. 1000/- each as their fee.

20. Let a copy of this judgment along with original record be sent to the Court below for incorporating necessary entry in the relevant register. Compliance be reported within two months.

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