

Atar Singh Etc. Vs. State of U.P.

Atar Singh Etc. Vs. State of U.P.

SooperKanoon Citation : sooperkanoon.com/490844

Court : Allahabad

Decided On : May-23-2002

Reported in : 2003CriLJ676

Judge : Bhanwar Singh, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 390, 391, 392 and 395; [Evidence Act, 1872](#) - Sections 9

Appeal No. : Criminal Appeal Nos. 2260 and 2278 of 1980

Appellant : Atar Singh Etc.

Respondent : State of U.P.

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : J.N. Chaturvedi, ;S.R. Varma, ;O.P. Singh and ;Ajay Singh, Advs.

Disposition : Appeal allowed

Judgement :

Bhanwar Singh, J.

1. These two appeals arise out of the same judgment dated 22-9-1980, passed by the then VII Additional Sessions Judge. Kanpur. By virtue of the said judgment, the

two appellants before this Court were convicted under Section 395, IPC and sentenced to serve five years in jail.

2. Yet one more accused, namely, Shrikrishna was also convicted along with the appellants but it could not be ascertained as to whether he filed any appeal or not.

3. The factual matrix, in brief, may be recapitulated as below :--

Sri Ram Prasad, son of Jia Lal, resident of Hasnapur, P. S. Akbarpur, District Kanpur (as it then was) submitted a report to the Station House Officer of P. S. Akbarpur, with the recitals therein that at about mid-night between 16/17-10-1977 16/17-10-1977 , 3-4 miscreants entered his house and started looting the valuable and on the resistance being offered by the females they were admonished. All the inmates of the house including the informant raised hue and cry, attracted by which came there several villagers from the vicinity but in the meantime, the miscreants managed to make their escape good with the looted booty. On account of darkness all around, the miscreants could not be chased. Besides a cash of Rs. 4000/- ornaments worth Rs. 4200/- were shown in the list of articles, which were taken away by the intruders. The applicant was also deprived of his three Dhotis worth Rs. 42/-. Ram Prasad suffered a punctured wound in his right leg during the course of occurrence. The Investigating Officer Sri B. D. Singh, S.I. was entrusted with the task of investigation of this case. He rounded up the accused appellants as also Shrikrishna and arranged for an identification parade on 29-1-1978. The witnesses Ram Prakash, Mauji Lal, Pattoo and Raghunath Prasad correctly identified the accused appellants Amir Ali alias Mina and Atar Singh to be as those, who amongst others, participated in the dacoity. The witnesses were interrogated and examined by the Investigating Officer, who had, after completing the other formalities of the investigation, submitted charge-sheet against the aforesaid two appellants Under Section 392, IPC. However, the Station Officer of P. S. Akbarpur being not satisfied with the investigation conducted by Sri B. D. Singh, assumed for himself, further investigation of this case and after the third accused Srikrishna was identified by the witnesses, he submitted a fresh charge-sheet under Sections 395 and 397, IPC against all the three aforesaid miscreants. On being committed to the Court of Sessions, all the three accused were charged

Under Section 395, IPC.

4. In order to establish its case, the prosecution examined three witnesses of fact. P. W. 1 Ram Prasad was the informant of the case. He proved his report Ext.Ka-1, but with an addition that the report which was prepared, had been torn by the police, who got the other report (Ext.Kal) written on their dictation. He did not participate in the identification parade, nor he could identify any miscreant at the time of dacoity being committed at his house. According to him, he fled away from the site of occurrence soon after he got injured with a bullet fired by the dacoits. P.W.2 Pattoo, who was the uncle of the informant, has asserted that he was sleeping on the night of occurrence outside the house. The dacoits awakened him, assaulted and took him inside the house where they looted the cash, jewellery and other valuables. He was thrashed out inside the house also. The other inmates, who came on their way, were also beaten. The dacoity lasted for about half an hour. In the meantime, the villagers, on hearing the hue and cry raised by the inmates of the house, started gathering outside the house. Seeing the villagers around, the dacoits fled away towards south of the village. Pattoo accordingly identified the three accused on trial. Similarly P.W.3 Raghunath Prasad, who is the brother of Ram Prasad, identified the three accused on trial, who had forcibly entered the house and looted valuables. P.W.4 B. D. Singh testified that he recorded the statements of the witnesses and inspected the house of the informant where the dacoity was committed. He also inspected the lantern and the torches in the light of which the witnesses had identified the miscreants. He had also recorded the statements of the villagers Mauji Lal, Surjan Singh and Chhidda. As stated by him further, the two appellants Amir Ali and Atar Singh were brought to the police station by some villagers of village Kishanpur in connection with another offence under Section 457/511, IPC and since they confessed their complicity in the commission of the dacoity committed by them with some other miscreants in the house of P.W. 1 Ram Prasad, they were kept Baparda and sent to jail. The third accused Srikrishna was arrested in January, 1978. All the accused were put up for test identification, which was supervised by the S.D.M. Akbarpur and all the three miscreants were correctly identified by two witnesses, namely, Pattoo and Raghunath Prasad. On the basis of the investigation conducted by P.W.4, he found that the two accused appellants had committed offence under

Section 392, IPC. He, therefore, submitted charge-sheet against them under the said Section but the Superintendent of Police (Rural Area), Kanpur did not agree with his findings and cancelled the charge-sheet. The Station Officer Sri R. K. Tewari was then directed to investigate into the matter and having made further investigations, he arrived at a conclusion that offences under Sections 395 and 397, IPC were committed' by the two appellants and one Shrikrishna, who was also put on test-identification, besides their associates. Therefore, he had submitted charge-sheet against them accordingly. P.W. 5 constable Patiram proved that he took the accused Atar Singh and Amir Ali to jail and so long the two were in his custody, they were kept Baparda by him. P.W.6 Sri R. K. Tewari testified that he examined all the witnesses afresh and eventually submitted charge-sheet under Section 395/397. IPC against the accused. By submitting an affidavit, constable Girja Shankar proved that he escorted the third accused Srikrishna to jail with his face covered so that he could not be seen by anyone.

5. In defence, the accused pleaded not guilty and denied all the incriminating allegations levelled against them. Atar Singh and Amir Ali, both stated that they were very well known to the witnesses as they hailed from villages located in close vicinity of the house of the informant and other witnesses. Whereas the offence was alleged to have been committed in Hasanpur village, the two accused belonged to Mauja Bhatoli and Kishanpur. It was on account of their earlier acquaintance that the witnesses easily identified them in the identification parade as well as in the Court.

6. The trial Court believed the testimony of P.W.2 Pattoo and P.W.3 Raghunath Prasad and held the three accused on trial guilty under Section 395, IPC. As recited in the judgment under appeal, there was sufficient light of lantern and torches to enable the witnesses to identify the accused. Accordingly, all the three accused were convicted under Section 395, IPC and sentenced to undergo five years' R.I.

7. Feeling aggrieved of the conviction and sentence awarded to them, Atar Singh and Amir Ali filed the present appeals challenging the evidence led by the prosecution and the findings of the trial Court.

8. I have heard the learned counsel for the two accused appellants and the learned Additional Government Advocate and have also perused the record.
9. It is amazing to note that the informant recited in his report Ext.Ka2 that some 3-4 miscreants forcibly entered his house through the door, which was open and started looting the valuables from the female flock of the house, yet the two appellants were tried and convicted for dacoity. Even if the miscreants were armed with deadly weapons while committing the offence of looting, they cannot be said to have committed dacoity, as for an offence of dacoity, minimum number of the miscreants required is 5. The term 'dacoity' is defined in Section 391 of the IPC, which clearly postulates that when five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit 'dacoity'. The offence of 'robbery' is defined in Section 390, IPC and as is clear from a perusal of the said section, even a theft is 'robbery' if during its commission the offender voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. Whereas 'robbery' is punishable under Section 392, IPC, dacoity is punishable under Section 395, IPC. Now the question arises as to whether it was a dacoity or robbery which could be said to have been committed in the house of the informant.
10. It has been submitted on behalf of the State that the informant conveyed to the Station Officer P. S. Akbarpur that a dacoity was committed in his house, but this fact seemed to have been deliberately screened by the police so as to avert record of a serious offence like dacoity against the accused. In this context, a reference to the testimony of the informant would be of a greater significance. P.W. 1 Ram Prasad asserted in his examination-in-chief that about 4-5 miscreants raided his house and no sooner than they entered the house, they started firing shots from their fire-arms. He added further that he submitted his written report to this effect, but it was torn into pieces by the Head Constable on duty with the observation that it was not properly drafted. It was thereafter that the report Ext. Ka 1 was drawn. During cross-examination, he deviated from the above averment of the report

being torn out and stated that his written report was burnt by the police. He, however, failed to disclose the name of the police official, who had put his report on blaze. He then stated that some police person had written both the reports, but this is not in consonance with the testimony of P.W.2 Pattoo, who is more else than Ram Prasad's own uncle. On the night of occurrence, Pattoo was sleeping at the main gate of the house and a lantern was lighting at the gate itself. According to him, the miscreants, who were 10-11 in number, came at about mid night and committed dacoity. He testified that the first report was got written in the village and the same was submitted to the police. This contradicts Ram Prasad's version that the first and the second reports --both were written by the same police official. Not only this, but Pattoo clearly rejected Ram Prasad's theory of the first report being torn into pieces by any police official. He stated in unambiguous terms that the report he got prepared in the village was submitted to the police and the same was acted upon. In this way the prosecution version that in spite of the fact that a dacoity by 10-12 miscreants was committed, the police purposely recited the number of the miscreants, the total of which did not bring the offence within the premises of the term 'dacoity' and thereby reduced the gravity of the offence, does not seem to be worthy of credit. A question arises that if the police did not commit any mischief either by tearing off the written report of the informant which he brought well-drafted from his own village, as confirmed by Pattoo P.W.2, why Ram Prasad as P.W. 1 had given out the number of the miscreants to be as 3-4 In the absence of any plausible explanation coupled with the unbelievable pretext of the report being torn, it appears to be sustainable, as argued on behalf of the accused, that the informant and subsequently the prosecution made an endeavour on the basis of an after-thought idea to develop the prosecution story of dacoity. Therefore, it is not established beyond doubt that the miscreants were more than five in number. In other words, what is recited in the F.I.R. seems to be correct and truthful version. In the consequence, it may be observed that it was not a case of dacoity but of robbery.

11. Now the next question, which would crop up for determination, is as to whether the two appellants before this Court were involved in the commission of the offence of robbery or not ?

12. It is note-worthy that the appellants were arrested on October 25, 1977 and put up for test identification on January 24, 1978 i.e. 91 days after their arrest. The appellant Amir Ali hails from village Bhatoli while Atar Singh is a resident of another village Kishanpur. Both these villages are located at a distance of one or two miles respectively from the village of the informant. Both the appellants have pleaded that they were known to the witnesses Pattoo and Raghunath Prasad as their agricultural fields are adjacent to each other's. In this background, the evidence of two witnesses, namely, Pattoo P.W.2 and Raghunath Prasad P.W-3, who allegedly identified the two appellants, cannot be accepted to be as trustworthy. The prosecution has not come forward with a plausible explanation as to why there was a delay of more than three months in putting the appellants to test identification. It has been held by the Hon'ble Supreme Court in 'Soni v. State of U.P., reported in (1982) 3 SCC 368 (1)' that identification parade held 40 days after the arrest of an accused throws a grave doubt on the genuineness of such identification. Similarly in 'Jairam v. State of U.P., (1995) 33 All Cri C 155' this Court held that a test identification held more than two months after arrest creates a long shadow of doubt upon the veracity of the identification. Yet in another decision in 'Mithoo Singh v. State of U.P., 1996 All Cri C 417 : (1996 All LJ 612)' this Court held that the memory of human-being is bound to fail after more than fifty four days after the occurrence and if the identification takes place after that duration, the result would be a bad performance. In other words, the value of such a test identification is totally diminished. The Apex Court also followed the same principle of law and held in 'Shabad Pulla Reddy v. State of Andhra Pradesh, (1997) 35 All Cri C 464 : (AIR 1997 SC 3087) that the test identification parade held three months after the arrest of the accused would lead to a difficult situation to infer that witnesses have correctly identified the appellants. The Supreme Court held that unusual and unexplained delay in holding the test identification parades makes it difficult to conclusively hold that after a long lapse of time, the witnesses were still able to have a clear image of the accused in their minds and identify them correctly at the identification parades. In 'Bundu v. State of U.P., (1992) 29 All Cri C 663' this Court ruled that if no description of physical feature is given in First Information Report, possibility of showing the accused to the witnesses after arrest cannot be ruled out. It was also held further that the test identification after

40 days of the arrest with no explanation for delay in holding the identification parade, possibility of the accused having been shown to the witnesses cannot be discarded. Although in the case in hand, both the appellants have claimed to be acquainted with the witnesses, yet it may be inferred in view of unexplained delay in holding identification parade, that the investigating agency might not have omitted any endeavour to seek foolproof identification. The Investigating Officer deliberately avoided to give out the distance between the villages of the witnesses and the appellants. When B. D. Singh, Station Officer P.W.4 was asked about the distance between the two villages, he expressed his ignorance -- may be to screen the reality of the witnesses and the accused being known to each other. As referred to above, Ram Prasad categorically stated that the distance between villages Hasanpur and Bhatoli is of only one mile. In view of this close vicinity of the two villages, possibility of the witnesses and the appellants being known to each other cannot be precluded.

13. There is another aspect of the matter which would belie the testimony of the two witnesses Pattoo and Raghunath Prasad. It appears that the names of these two -witnesses were not mentioned as eyewitnesses of the occurrence in the first information report. Therefore, their testimony about their having availed an opportunity to eye the occurrence and the miscreants is ruled out. Learned Additional Government Advocate contended that both of them were inmates of the house and most natural witnesses. A perusal of the evidence of Pattoo will reveal that he was sleeping at the main gate of the house on the night of occurrence and he woke up from his sleep on being thrashed by the miscreants. There was a lantern lighting at the gate and he said further that there was no light inside the house. This belies the statement of other witness Raghunath Prasad that a lamp was lighting inside the house also. Pattoo disclosed that he was mercilessly beaten by the miscreants and twice or thrice he was picked up and knocked on the ground. However, this statement does not seem to be in conformity with the injury report of the witness, a perusal of which would reveal that he complained of mere pain in his body. Had he been thrown on the ground violently as stated by him, he was bound to suffer, if not many, some serious injuries but there was no external injury sustained by him. May be he was else where at the relevant-time of occurrence. Apart from that, Pattoo is a previous convict as was clearly admitted

by him. Considering all these facts and circumstances, I am of the view that the evidence of this witness falls too short to inspire confidence in its genuineness.

14. Similarly the evidence of Raghunath Prasad is not worthy of credit. His name is not there in the first information report, nor his statement was recorded by the Investigating Officer. He was also not caught by the miscreants nor beaten. When he heard the reports of gunfire, he took to his heels and came back to his house only after the miscreants had left. Thus his evidence too is not worth being placed reliance upon.

15. It is important to note that although numerous villagers; namely, Ram Prakash, Mauji Lal, Surjan Singh, Chhidda and others had come to the house of the informant and they had the opportunity to see the miscreants, yet none was examined in support of the prosecution case.

16. Further it is worth to mention that the fact of the miscreants having fired numerous shots from their fire-arms is not disclosed in the first information report. Also is no convincing description of firing and dacoity. In view of this lacuna, the prosecution case with evidence of the witnesses cannot be termed to be as believable.

17. Keeping in view all what has been discussed above, I am of the decisive opinion that the prosecution miserably failed to establish the guilt of the accused appellants beyond a shadow of reasonable doubt. Accordingly their conviction and sentence cannot be allowed to sustain.

18. In the result, both the appeals are allowed and the judgment of conviction and sentence dated 22-9-1980 passed against the two appellants is set aside. Both the appellants are held not guilty and are acquitted. They are on bail, to which they need not surrender. Their bail bonds are cancelled and sureties discharged.