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Baboo Vs. State of Madhya Pradesh

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Court : Madhya Pradesh

Decided On : Jun-23-2005

Reported in : 2005(4)MPHT210

Judge : A.K. Gohil and ;Chandresh Bhushan, JJ.

Acts : Arms Act - Sections 25 and 27; Indian Penal Code (IPC) - Sections 34, 302, 399, 400 and 402; Code of Criminal Procedure (CrPC) - Sections 374

Appeal No. : Criminal Appeal No. 53/1992

Appellant : Baboo

Respondent : State of Madhya Pradesh

Advocate for Def. : V.G. Khot, Public Prosecutor

Advocate for Pet/Ap. : J.P. Gupta, Sr. Adv. and ;Atul Gupta, Adv. in Cr.A.No. 53/1992 and ;L.S. Chuohan, Adv. in Cr.A. No. 54/1992

Disposition : Appeal allowed

Judgement :

A.K. Gohil, J.

1. This judgment shall govern the disposal of both the aforesaid criminal appeals. On an allegation that Mangaliya and Mori were shot dead by the appellants in

furtherance of their common intention both the appellants were prosecuted in Sessions Trial No. 255/90 for the charges under Section 302 and in alternative under Section 302/34 and both have been convicted under the aforesaid sections vide judgment dated 28-2-92 and sentenced to life imprisonment. Against which they have preferred this criminal appeal under Section 374 of the Code of Criminal Procedure, challenging their conviction and sentence.

2. As per prosecution story, in the night of 18-6-90 deceased Mangaliya and Mori were staying in the field of Ram Baboo near the field and tubewell of Kunwarsingh at Village Nand-ka-pura in their tents together with Gopal, Girdhari, Augad, Aman and others and they were carrying herd of sheeps, cattle and goats. They had come from Rajasthan. In the midnight after 2 o'clock some miscreants (Badmash) came to their tent. They awakened Mangalia and demanded a goat from him. A wordy quarrel arose and hearing that Mangaliya's sister Mori also came there. On refusing, the miscreants fired at Mangaliya and Mori. Hearing the noise of firing, Gopal and Devaram also came there. Mori died on spot by gunshot. Mangaliya was alive. He was being taken to Porsa for treatment by the villagers but he died in the way. As a consequence of the shots fired some goats also died. Gopal P. W. 8 lodged FIR (Ex. P-13) at Police Station Porsa. Gopal was originally resident of Rajasthan and only at the last night he had come to stay at the place of occurrence. The FIR was lodged, crime was registered. The matter was investigated. Site plan Ex. P-14 was prepared by Ram Baboo Singh Bhadoriya (P.W. 11) and two empty cartridges of .315 boer were also seized from the spot vide Ex. P-17. Co-accused Rameshwar was arrested vide Ex. P-9 and appellant Baboo was arrested on 27-6-90 vide Ex. P-22. In post-mortem examination, two gun-shot injuries were found on the chest of Mangaliya. Gunshot wounds were also found on the body of Mori. After the arrest of the appellants, they were put to identification test parade on 1-9-90 and after investigation charge-sheet was filed. During trial, in all four accused persons were put to trial, out of which the Trial Court convicted the aforesaid two appellants and acquitted on Premsingh and another co-accused Rameshwar is still absconding. Against the said conviction and sentence the appellants have filed this appeal.

3. We have heard Shri J.P. Gupta, learned Senior Advocate, and Shri L.S. Chouhan, learned Counsel for the appellants and Shri V.G. Khot, learned Public Prosecutor, for the respondent-State and perused the evidence on record.

4. Shri Gupta argued and submitted that the Trial Court has erred in relying upon the testimony of P.W. 8 Gopal and P.W. 10 Devaram. None of the witnesses knew the appellants from before by name. The accused persons were not named in the FIR nor any description about their identity was given in the FIR. He further argued that none of the witnesses had given the description in the police statement or even before the test parade. The witnesses had no occasion to see the miscreants. According to him, the evidence of Gopal (P.W. 8) and Devaram (P.W. 10) is not at all reliable. When the incident took place it was the dark night. There was no source of light, therefore, there was no occasion to the witnesses to identify the miscreants. His total submission was that there is no reliable evidence available on record about the identification of the appellants. He further argued that the evidence about the seizure of two empty cartridges of .315 bore is doubtful. Those cartridges were not properly sealed nor kept in proper custody in Malkhana nor were referred quickly for examination by the ballistic expert. There is delay of more than three months and the same has also not been explained. He vehemently argued on the point that after sealing the said empty cartridges, seal was not handed over to the Panch or independent witnesses, which is a mandatory requirement as per the decision in the case of Mahmood v. Slate of Uttar Pradesh : 1976 CriLJ10 ; and, Mohd. Aman v. State of Rajasthan with Babu Khan v. State of Rajasthan : 1997 CriLJ3567 , and he also cited various other authorities on the question of non-compliance of a mandatory requirement and also on the question that the articles should be despatched to the expert for examination at the earliest and if there is a delay, the opinion given by the expert is of no value. He further argued that the Panchnama is not a substantive piece of evidence and prayed for the acquittal of the appellants.

5. In reply, Shri V.G. Khot, learned Public Prosecutor, for the respondent-State supported the judgment and prayed for the dismissal of the appeals.

6. After hearing learned Counsel for the appellants, we have perused the evidence on record. The evidence of P.W. 8 Gopal, who lodged the FIR, is not at all reliable. In the cross- examination he has admitted that it was dark-night. The source of light was available near the spot as electricity was available near the tubewell but he has admitted that in the FIR Ex. P-13 this fact has not been mentioned that the source of light was available near the place of incident. In the spot map also, this facts has also not been mentioned whether the source of light was available on the place of incident. It is not in dispute that the incident took place after the midnight at about 2.30 a.m. P.W. 8 Devaram has stated in his statement that while lodging the FIR he had narrated the description of the miscreants to the police but why the police has not written the same in Ex. P-13, he can not give any reason. Why the police has also not written the description of the miscreants in his case diary statement, Ex. D-1, he does not know. In the cross-examination he has stated that he had intimated to the police that he could not identify any person and he had also not identified them at Circuit House at Porsa nor he was in a position to identify any person as a miscreant. Further, in the cross-examination he has admitted that he was not in a position to identify any of the persons those who were present at the time of test identification parade. In the cross-examination he has further stated that his memory is quiet weak and short, therefore, he cannot say that what kind of clothes the miscreants were wearing; what was the colour of hairs and whether they were having any cap on the head or not. He further deposed that at the time of test identification parade he was knowing the faces of the miscreants but today he is not in a position to remember it or to identify anybody. He states that his mental condition is not good and in these days he is not in a position to even identify his own goat. Today he has identified the persons in the Court on the basis of his memory but he does not remember their description but according to his conscious there can not be other persons than these accused, who have killed the deceased.

7. P.W. 9 Bhavari, who is the wife of Mangaliya, has deposed what when she came out from the tent, the miscreants had run away from the spot and she had not seen anybody firing, therefore, she has not supported the prosecution case and was declared hostile.

8. P.W. 10 is Devaram. In the cross-examination he has stated that the names of the persons were made known to him in presence of Tehsildar, before whom he had identified. He had gone to identify the persons after a month. All the three persons those who were brought for identification were handcuffed with iron chain and they all were shown to him at the time of identification and thereafter he had identified them, though lateron he states that the persons to whom he had identified were not handcuffed with iron chain. He has admitted that at the time of incident atleast 10-12 persons and 10-12 ladies were present on spot. Why the police has not written in case diary statement Ex. P-2, that he heard the cries of Mangaliya and thereafter he woke up and came on spot, he can not give any reason. Why the police has not written this that near the place of occurrence electricity light was available, he can not give any reason. He has admitted that without light it was not possible to see the assailants. Why the police has not written in his case diary statement Ex. D-2 that there was wordy quarrel or altercation between the assailants and Mangaliya, he can not give any reason. He has admitted that when he reached near Mangaliya, he was already injured and Mori had also received firearm injury. He has stated that he had not chased the assailants, as he was in the state of fear. In the cross-examination he has denied that he has given any description of the assailants to the police. He has admitted that he could not give the description of the assailants, as in the night he could not see their stature. He has admitted that the bullet which hit Mangaliya had also hit the sheep. He has stated that the assailants were also abusing and they abused before making the fire and after making fire they ran away from the spot. It took only two minutes time. Why the police has not written in case diary statement, Ex. D-2, that after hearing the noise of fire he came near Mangaliya, he can not give any reason. In the cross-examination further he has admitted that it was the Tehsildar, who had shown the accused persons to him nor the Thanedar. He has identified them in the Court on the basis of earlier identification at Porsa. The description of appellant Babu which he had given to the police, he does not remember the same description today and the same description has not been mentioned in his case diary statement Ex. D-2. He has further admitted that he had seen the appellant Babu first time at Porsa and admitted that he had not seen him earlier but further he has stated that he had also seen him at the place of

occurrence and at the time of incident. About the presence of Gopal on spot this witness says that Gopal was present in his tent and till he reached on the spot, the assailants ran away. Gopal had not come out from his tent and first he came on spot and thereafter Gopal came and nobody else came on spot. When they both came, Bhavari wife of deceased Mangaliya was already there and she was weeping. The other persons came on spot but they had not seen the incident. They had only seen the dead-bodies. He has admitted in the cross-examination that at the time of preparation of the spot map he had intimated to the I.O. (Thanedar) that the light was available near the place of incident and place of incident was visible but why in Ex. P-14 the same has not been mentioned, he can not give any reason. There was difference of half a field between the place of occurrence and the tubewell where light was available.

9. From the aforesaid evidence of the two witnesses, it is clear that the incident took place at about 2.20 a.m. after the midnight. It was the day of dark-night. The source of light was not available at the place of incident but as per the statement of both the witnesses it was available at the place of some distance near the tubewell. Nothing has been mentioned either in the FIR or in the case diary statement of the aforesaid witnesses or in the site plan which is spot-map about the availability of the source of light. In the spot-map Ex. P-14 the place of tubewell has not been shown and it has not been mentioned that at the tubewell light was available. P. W. 11 Ram Baboo Singh Bhadoriya, I.O., in Para 15 of his deposition has stated that he had recorded the statement of P. W. 10 Devaram and P.W. 8 Gopal, Ex. D-l and D-2. Gopal and Devaram both have not given the description of the assailants nor have stated about the availability of the light near the tubewell nor they have stated that they had identified the assailants in the light of the tubewell. Therefore, from this evidence it is clear that no source of light was available near the place of incident and it was difficult for the witnesses to identity the assailants. Normally when such incident happens, the assailants do not leave any evidence against them.

10. So far as the question of identification of the appellants is concerned, P.W. 14 Gajendra Singh Jadone, who was posted as Thana Incharge at Ambah on 26-6-90, has stated that on the information of informer he had arrested appellant Babu

Nut in Crime No. 159/90 under Sections 399, 400, 402, IPC and Sections 25 and 27 of Arms Act and at the time of arrest and search he found one Katta of .315 bore and two live cartridges from the appellant and thereafter the intimation of the arrest of the appellant was given to all the police stations. T.I. Porsa came to interrogate the appellant. P.W. 11 R.B.S. Bhadoriya, Sub- Inspector of Police Station Porsa, has deposed that after recording the FIR Ex. P-13 he inspected the spot and prepared spot-map (Ex. P-14) at the instance of Devaram and Machalsingh, seized two empty cartridges from spot along with plain and bloodstained earth and some pieces of bangles of deceased Mori and also one pair of shoes of deceased Mangaliya and thereafter on 7-9-90 arrested co-accused Rameshwar. On 2-9-90 he had also arrested Kamlesh and Babu and before that on 30-8-90 he had issued a letter for identification of accused Kamlesh, Babu and Rameshwar. It is admitted that the identification parade was arranged on 2-9-90. It was the case of the prosecution that from the statements of Kunwarsingh and Machalsingh (Ex. P-5 and P-6) he came to know about the name of appellant Babulal Nut and these statements were recorded by him in the month of July, 1990. This delay has not been explained that when he came to know in the month of July '90 about the suspicion against Babu then why there was delay in arranging the test identification parade. This conduct of the Investigating Officer further creates suspicion in his investigation and also regarding the involvement of the appellant in the commission of crime. From the aforesaid evidence on record and the test identification parade, it has raised serious doubt that it was not arranged properly and legally and the appellants were not identified as assailants.

11. In the case of Wakil Singh and Ors. v. State of Bihar : 1981 CriLJ1014 , the Supreme Court has held that 'in the instant case we may mention that none of the witnesses in their earlier statements or in oral evidence gave any description of the dacoits whom they have alleged to have identified in the dacoity, nor did the witnesses given any identification marks, viz., stature of the accused or whether they were fat or thin or of a fair colour or of black colour. In absence of any such description, it will be impossible for us to convict any accused on the basis of a single identification, in which case the reasonable possibility of mistake in identification can not be excluded.

12. Division Bench of Allahabad High Court in the case of Asharfi and Anr. v. The State 0043/1961 : AIR1961 All153 in its detailed judgment has dealt with various aspects of the identification that what is the object of test identification parade, who can hold it, its legal effect, concealment of distinctive marks and the care should be taken that the accused must not be seen by witness between crime and test identification parade. The prosecution should explain the delay in holding it and the absence of a reasonable explanation will detract from the value of the test, the conditions necessary for acceptable identification evidence and the duty of the Court.

13. From the aforesaid discussion and in the light of the cases relied, it is clear that there was no proper identification in this case. P.W. 8 Gopal and P.W. 10 Devaram both have not supported the test identification and their evidence is not at all reliable so far as the identification of the accused persons is concerned. In the course of statement of Devaram the prosecution made a request with the Court that the accused persons be got identified in the Court also and for that the witness be sent out and the other persons be mixed. At this stage, witness Devaram (P.W. 10) identified one stranger Virendra as one of the persons who were assailants. He further insisted that he had identified Virendra also before the Tehsildar. Therefore, from the aforesaid exercise, it is clear that the identification of the appellants is not proper and raises a serious doubt and can not be relied upon. Unless there is a positive and unblemished evidence of the witnesses about the identification of the accused, the identification can not be treated as proper and reliable and conviction can not be based thereon.

14. While convicting the appellants Trial Court has placed reliance on the report of the ballistic expert, which is Ex. P- .25, according to which, 0.315'/8 mm. bore one Desi pistol Article A-1 was found in running condition and as per prosecution case the aforesaid pistol was recovered from appellant Babulal and two empty cartridges marked as Articles EC1 and EC2 were found from the spot and as per this report they were fired from the same pistol.

15. Shri Gupta submitted that there is no reliable evidence that the aforesaid pistol was seized from appellant Babu. Three empty cartridges were said to have been

seized from the possession of Devaram (P.W. 10) and Machalsingh (P.W. 2). Machalsingh (P.W. 2) has denied that any article was seized from the spot in the presence. Devaram (P.W. 10) has stated that two empty cartridges were seized by the police. Though he has proved his signatures on seizure-memo (Ex. P-17) but there is no evidence on record that the empty cartridges were seized in his presence nor he has stated that they were sealed in his presence. There is no evidence on record that after sealing the said empty cartridges the seal was handed over to the Panch. As per the decision of the Supreme Court, it is a mandatory requirement. In the case of Mahmood v. State of Uttar Pradesh : 1976 CriLJ10 , it has been held that the investigator did not take all the necessary precautions which could be taken to eliminate the possibility of fabrication of this evidence, or to dispel suspicion as to its genuineness. Admittedly, he sealed the box with his seal which thereafter remained with him throughout. After sealing the parcel he did not entrust the seal to the Sarpanch or any other respectable person of the village. Supreme Court has found that there was no proper compliance of the said procedure and that had raised serious doubt in the conduct of the Investigating Officer.

16. In the case of Mohd. Aman and Anr. v. State of Rajasthan with Babu v. State of Rajasthan : 1997 CriLJ3567 , the Supreme Court has considered the question of delay in sending the articles for examination and found that the prosecution has failed to establish that the seized articles were not or could not be tampered with before it reached the Bureau for examination. Though evidence was led to prove that after seizure the articles were packaged and then sealed, no evidence was led to indicate what was the mark given in the seals and whether the Bureau received the packages with the marked seals intact. Indeed, even the contemporaneous letters exchanged between them (Ex. P-59 and P-60) do not throw any light on this aspect of the matter. Rather, other circumstances appearing on record makes the prosecution case doubtful in this regard; first, the articles were kept in the police station for five days without any justifiable reason, secondly, the Investigating Officer (P.W. 20) admitted that the seal, mark of which was put on the articles, was with him since the time of seizure and lastly his letter (Ext. P-59) forwarding the seized articles to the Bureau contains admittedly, an overwriting as regards the date of it writing/despatch and no satisfactory

explanation was furnished for the same.

17. Recently, in the case of State of M.P. v. Gudan, 2004(1) M.P.H.T. 476 (SC) : AIR 2004 SC 797, the Supreme court has also considered this aspect of the matter that empties sent to ballistic expert after six months were not sealed at the time of seizure and identity of empties seized by expert can not be safely tallied and the acquittal of the accused was found proper.

18. In the instant case also, we found that the empty cartridges were seized on 18-6-90 and the gun was received from other criminal case and shown as Ex. P-27 on 21-9-90 from Police Station Ambah. They were despatched on 4-10-90 and received on 12-10-90. The prosecution has not furnished any explanation for this long delay. There is no evidence that during this period where they were kept. There is no evidence that the seal was handed over to any independent witness, which clearly shows that the seal remained in the custody of Investigating Officer. No Malkhana entries have been found proved that during all the days where the articles remained and in whose possession and in what condition. Therefore, in the light of the aforesaid evidence and the law laid down by the Supreme Court in the aforesaid cases, we do not see that there is any reliable or cogent evidence available on record about the proper seal and custody of the articles. In such a situation, possibility of tampering also can not be ruled out. Therefore, in the light of the aforesaid discussion, the report Ex. P-25 can not be treated to be a conclusive evidence in favour of the prosecution to uphold the conviction of the appellants.

19. Considering the totality of the facts and circumstances of the case, and the fact that there is no cogent evidence available on record against the appellants about their involvement in the commission of crime. It is to be mentioned that the suspicion howsoever strong it may be, it can not form the basis of legal evidence. The evidence of P.W. 8 Gopal and P.W. 10 Devaram is not at all reliable regarding the identification of the appellants in the case, therefore, the important evidence of identification is missing in this case. Not only this, the evidence about seizure of articles and their examination by the expert is also doubtful in the light of the discussion in the preceding paragraphs. There is no clinching, direct and reliable

evidence available on record for the involvement of the appellants in the commission of crime. Therefore, in the absence of any such evidence, the conviction of the appellants can not be upheld. They are entitled for benefit of doubt.

20. Consequently, these appeals are allowed. The appellants are acquitted from the charges. They are on bail. Their bail bonds be discharged.

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