

Ghanashyam Das and ors. Vs. the State

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Court : Orissa

Decided On : Oct-05-1983

Reported in : 1984CriLJ588

Judge : B.K. Behera, J.

Appellant : Ghanashyam Das and ors.

Respondent : The State

Judgement :

B.K. Behera, J.

1. These appeals, arising out of the same judgment and order passed by Mr. A. C. Das, Assistant Sessions Judge, Cuttack, in Sessions Trial No. 38 of 1981, finding the appellants to be guilty of the charge of dacoity, convicting them under Section 395 of the Penal Code and sentencing each of them to undergo rigorous imprisonment for a period of eight years, have been heard together and will be governed by this common judgment.

2. The appellants along with others, as alleged, being armed with deadly weapons, broke open the house of Purnachandra Panda (P. W. 2) at village Barput in the district of Cuttack during the night of May 17/18, 1980 and keeping the inmates of the house under the fear of instant death at the point of gun, removed cash and gold and silver ornaments and decamped. They also committed dacoity during the

same night in the house of Dhaneswar Panda (P. W. 8) after keeping him under confinement and assaulting him which, as has been submitted at the Bar, was the subject matter in another case. P. W. 2 lodged the first information report (Ext. 4) on May 18, 1980 and the Officer-in-charge of the Banki Police Station took up the investigation, visited the spot and seized some articles. For a long period, no clue could be obtained regarding the identity of the culprits. On receiving a telephonic message on July 27, 1980 from the Additional Superintendent of Police, Cuttack, that some culprits had been rounded up in connection with the Govindpur Police Station Case No. 67 of 1980 under Section 395 of the Penal Code and that they were involved in this case, the Officer-in-charge (P. W. 10) proceeded to Cuttack and on receiving information that a wrist-watch (M. O. I) belonging to Pra-fulla Kumar Panda (P. W. 6), the son of P. W. 2, had been sold to a betel shop-keeper at the S. C. B. Medical College Hospital gate at Cuttack, he proceeded with the appellants P. Krishna Reddy and Banaonali Dalai to the shop of Nabakishore Swain (P. W. 9) and from there he proceeded to Kuakhia Bazar where he seized the wrist-watch on production by P. W. 9, as per Ext. 6. The appellants were arrested and in the course of investigation steps were taken for a test identification parade for the identification of the appellants by P. Ws. 2 and 6. A test identification parade was held by the Judicial Magistrate (P. W. 1) on August 4, 1980 in respect of the appellants other than the appellant Bidu alias Bidyadhar Sahu who was reported to be ill on that day and P. Ws. 2 and 6 identified the eight appellants to be the persons among the culprits, On August 11, 1988, another test identification parade was held in respect of the appellant Bidyadhar and P. W. 2 identified him to be one of the culprits. A test identification parade in respect of the wrist-watch (M. O. I.) had been held by the same Magistrate on July 29, 1980 and it was identified by P. Ws. 2 and 6. This test identification parade in respect of the wrist-watch was of no avail, as has rightly been submitted by the learned Counsel for both the sides, as no other wrist-watch of similar make had been mixed up. The appellant Ghanashyam, it was alleged, had deposited an amount out of the booty in the pass book of Chandamani Dei (D. W. 1) who was to be his concubine which had been denied by the appellant and Chandamani Dei (D. W. 1) who had been examined by the defence and she had claimed the money to be hers. On the completion of investigation, a charge-sheet was placed and the appellants were

prosecuted and their case was one of false involvement in the case.

3. To bring home the charge to the appellants, the prosecution had examined eleven witnesses. Of them, P. Ws. 2, 6 and 8 were witnesses to the identification of the appellants. The finding of the trial court that a dacoity had been committed in the house of P. Ws. 2 and 6 during the night of May 17/18, 1980 around 1.00 a. m. has not been assailed and rightly so, in view of the clear and acceptable evidence in this regard. The identification of; M. O. I. has not been disputed and none of the appellants had claimed M. O. I. as belonging to him. The learned Counsel for the appellants have invited my attention to the suspicious features in the evidence of identification of the appellants by P. Ws. 2, 6 and 8 coupled with the defects and irregularities in respect of the identification proceedings and have submitted that the evidence with regard to the identification was highly unsatisfactory and could not be accepted. It has been contended that the story of the prosecution that the appellants P. Krishna Reddy and Banamali Dalai had pledged M. O. I. with P. W. 9 ought not to have been accepted. The learned Standing Counsel has supported the order of conviction against the appellants as well founded on the evidence on record.

4. As can be seen from the first information report (Ext. 4) lodged by P. W. 2 and the evidence of P. Ws. 2, 6 and 8, the culprits were not known to them from before, P. W. 2 had, however, given some descriptions of the culprits in Ext. 4 and according to him, they were short and of dark complexion and were aged between 25 and 35 years. The occurrence had taken place during the night time and as would be clear from the evidence, it was a dark and cloudy night. The witnesses had claimed to have identified the culprits as they had been focusing torch-lights. There was no clear evidence led by the prosecution that the appellants had been focusing torch-lights at themselves. If as deposed to by the identifying witnesses, the appellants had been focusing torch-lights at the witnesses, that would make the identification of the culprits difficult as their eyes would dazzle. As the evidence of P. W. 4 would show, he was sleeping on the front verandah of P. W. 2 when the occurrence took place. The evidence of P. Ws. 2 and 6 was that they had gone away with the other inmates of the house to the house of their neighbour (P. W. 8) when the depredation went on in their house. From the point of distance, P. W. 4

was close to the culprits, He had, however, admitted in his evidence that he could not recognise any one of the culprits. If he could not identify any one of them, it was highly unlikely that P. Ws. 2 and 6 would be able to recognise the culprits and identify them long thereafter, first at the test identification parade and then in the court.

5. It had been stated by P. W. 2 in Ext. 4 that the culprits were short and were of dark complexion. The evidence would show that the appellants Banamali, Niranjana and Ghanashyam are not of dark complexion. There is the evidence of P. W. 4, that the complexion of the appellants Sarat and Bidyadhar is neither fair nor dark and it is Sabana. P. W. 2 has testified that the appellants Banamali and Niranjana have fair complexion and the appellant Bidyadhar is a tall person. According to him, the appellant Ghanashyam is neither a short person nor is of dark complexion. P. W. 3 has deposed that the appellants Bidyadhar and Ghanashyam are not short and the complexion of the appellant Bidyadhar is pale-white. The approximate ages of the culprits were between 25 and 30 years, as stated in Ext. 4. It would, however, be seen from the statements recorded by the trial court in which the approximate ages of the appellants have been put by the court that the appellant Niranjana Ghanashyam and Bidyadhar were aged. about 44 years, 46 years and 42 respectively. Evidently to get over the discrepancies in the statements made in the first information report and his evidence in the court, P. W. 2 went to the length of disowning the statements made by him in the first information report with regard to the descriptions of the culprits and their approximate ages. This would give an indication as to how untrustworthy is P. W. 2.

6. In a case of this nature, where the culprits were not known to the identifying witnesses from before, their evidence of identification in the court would ordinarily be valueless unless their faculty of identification had been tested in a prior test identification parade which should be conducted fairly and properly without affording an opportunity to the identifying witnesses to see the suspects put at the test identification parade prior to it. In this connection, reference may be made to the principles laid down in : 1979 CriLJ919 Kanan v. State of Kerala : 1980 CriLJ965 State (Delhi Admn.) v. V. C. Shukla and : [1982]3SCR277 Mohan Lal

Gangaram Gehani v. State of Maharashtra. In the instant case, the test identification parade had been held about two and a half months after the occurrence. As the occurrence had taken place during the night time when it was dark and P. Ws. 2 and 6 had gone away to the house of P. W. 8 out of fear, it would have been difficult for them to closely mark the features of the culprits and remember the features a long time thereafter for the purpose of identification. P. W. 8 had, no doubt, seen some of the culprits who had tied him, but on his own showing, it was a dark night and he must have been in a great state of fear and excitement. The evidence of such witnesses with regard to the identification must, therefore, be examined with care before its acceptance, especially as after a long time, it would be difficult for the witnesses to remember the identifying features of the culprits. In this connection, reference may be made to the observations of the Supreme Court in : (1982)3SCC368 Soni v. State of Uttar Pradesh.

7. P. Ws. 2 and 6 had identified the appellants other than the appellant Bidyadhar at the test identification parade on August 4, 1980, as deposed to by them and by the Judicial Magistrate (P. W. 1). P. W. 2 was the only person who had identified the appellant Bidyadhar at the test identification parade conducted later. P. W. 8 had claimed to have identified the appellants at the test identification parade, but the Judicial Magistrate (P. W. 1) had not spoken about it and no other evidence had been led by the prosecution showing that this witness had identified the appellants or any of them at a test identification parade. The evidence of such a witness with regard to the identification of the appellants could not safely be accepted. As earlier indicated, P. W. 4 who was very near to the culprits had not been able to identify any of the appellants. P. W. 6 had not been called to identify the appellant Bidyadhar at the test identification parade. In the circumstances in which P. W. 2 had been placed at the time of the occurrence, it would not be safe, reasonable and proper to accept unreservedly his sole testimony with regard to the identification of the appellant Bidyadhar and base a conviction thereon without any one else identifying this appellant.

8. As would clearly appear from the evidence, the test identification parade on August 4, 1980 had not properly been conducted. While according to the Judicial

Magistrate (P. W. 1), the Investigation Officer had taken all steps and had made arrangements for the test identification parade and was, in fact, present when the identification parade was held, the Investigating Officer (P. W. 10) had denied this and had stated that he had not taken steps for the test identification parade and was not present at Cuttack. There is no reason to discard the evidence of the Judicial Magistrate in this regard and the fact that the investigating Officer was present on the spot, had made arrangements and was present when the test identification parade was held would tell its own tale and affect the bona fides of the investigation. The Judicial Magistrate had stated in his cross-examination with reference to the test identification held on August 4, 1980 thus: I conducted the T. I. Parade when the accused persons were produced before me. The I. O. concerned arranged the T. I. parade. He got the witnesses and introduced them to me. I cannot say if the persons mixed up with the suspects are U. T. Ps. The suspects were produced before me from police Rajat and thereafter taken to place of T. I. parade. The distance between my court room and Court Rajat is about 100 yds. In between my court room and Rajat is the P. I.'s office. The witnesses appeared and were asked to wait outside before the production of accused persons in my court.... The identifying witnesses have not stated before me the particular act done by the suspects at the time of occurrence.

XX XX XX XXI cannot say if the identifying witnesses had previous acquaintance with the suspects....

P. W. 6 had stated that they were waiting outside the Court for the purpose of test identification parade. All this would show that the identifying witnesses who had been brought for the purpose of identification and had been produced before the judicial Magistrate had been asked to wait outside and after the appellants to be identified on that day were produced in the court, the test identification parade was conducted. Although P. Ws. 2 and 6 had denied to have seen the culprits prior to the test identification parade, there appears to be ample force in the contention of the defence that they had been asked to wait outside and they were in a position to see the culprits when they were produced in the Court to facilitate them to identify them at the test identification parade. In his state of affairs, the identification of eight of the appellants at the test identification parade by P. Ws. 2

and 6 would be valueless in view of the highly suspicious features mentioned above.

9. P. W. 2 had claimed to have identified the appellants as they had been focusing torchlights. But he had not stated about it in the first information report or before the Investigating Officer. He had admitted in his evidence that he had not been able to identify the four persons who focused torchlights at him. while P. W. 6 was under cross-examination, he was confronted with a statement said to have been made in the course of investigation that out of the culprits, he could identify four persons. I, however, notice that this contradiction was not formally proved when the Investigating Officer was cross-examined. Having allowed this contradiction to be put while P. W. 6 was under cross-examination, the trial Court ought to have seen the case diary and asked the Investigating Officer about it. After all, the Court is not a disinterested spectator of the contest before it. When either party leaves out something, it is the Court's duty to elucidate the matter in order to get at the truth, However, as his contradiction had not formally been proved, no notice could be taken of it. There were, however, other suspicious features in the evidence of P. W. 6 to which reference has been made by me. Like the Investigating Officer, P. Ws. 2 and 6 had also given out in the Court as if the Investigating Officer had nothing to do with the test identification parade. These statements of P. Ws. 2 and 6 and those of the Investigating Officer would be belied by the evidence of the Judicial Magistrate (P. W. 1). The fact that these witnesses and the Investigating Officer had suppressed the truth in this regard would affect their evidence and would cast a serious reflection on the bona fides of the investigating agency with regard to the test identification parade.

10. I have already indicated as to how the evidence of P. W. 8 that he had identified the appellants at the prior test identification parade had not been supported by any other evidence. That apart, he did not state to the Investigating Officer that the culprits had bombs in their hands and had been threatening P. W. 5 and Natabar Das and that they effected their entry into the house of P. W. 2 by breaking open the door and that he could identify the culprits by the light of the torchlights.

11. The trial Court did not take notice of the aforesaid suspicious features and weaknesses in the evidence with regard to the identification of the appellants and adopted an unwarranted reasoning and recorded in the judgment:..One may not remember the detailed particulars or features of an accused to trace him out of a host of others but once he sees a particular man putting him in distress his intuitional power would lead to detect the culprit although he might not be aware of his features. His conscience would point out that man in connection with commission of any heinous crime....

12. A Court is to judge the truth of the prosecution case not on the basis of moral or psychological satisfaction, but on the basis of legal and acceptable evidence. The observation of the trial Court quoted above which might have influenced the Court's mind while judging the truth of the prosecution case against the appellants ought not to have been made by a Court of Session.

13. On a consideration of the evidence, I would hold, in disagreement with the trial Court, that the prosecution had failed to establish by the evidence of P. Ws. 2, 6 and 8 with regard to the identification of the culprits that the appellants has committed the offence of dacoity in the house of P. Ws. 2 and 6.

14. The trial court had discarded the theory of the prosecution that the appellant Ghanashyam had deposited an amount out of the booty in the name of D. W. 1 and according to the trial court, it had been established by this appellant through the evidence of D. W. 1 that the latter had kept her own money in her pass book.

15. The only other evidence is with regard to the recovery of the wrist-watch (M.O.I.) involving two of the appellants; namely, P. Krishna Reddy and Banamali Dalai. Nabakishore Swain (P. W. 9), a betel shop-keeper near the S. C. B. Medical Cillege Hospital at Cuttack, had given evidence on July 22, 1981 that about a year prior to that, the appellants Banamali Dalai and P. Krishna Reddy came to him with M.O.I., and offered to pledge it with him representing that the father of the appellant Banamali was ill and had been admitted in the hospital for which money was required. According to this witness, he first expressed his unwillingness, but as they insisted, he agreed to keep M.O.I, on pledge and handed over Rs. 150/- to them and three to four days thereafter he went to his village and gave M.O.I. to his

brother. Two months thereafter, according to this witness, the police authorities came to him with the appellant P. Krishna Reddy and asked him as to whether he had kept the wrist-watch and he replied that he had kept it. The reply of P. W. 9 to the police officer ought not to have been admitted in evidence being hit by Section 162 of the Criminal P. C.

P. W. 9 had further gone on to say that he accompanied the police authorities to Kuakhia Bazar and there, he handed over M.O.I. to them after bringing it from his brother and this article was seized as per Ext. 6. P. W. 9 had not deposed that he had known the appellants from before. The transaction had not been entered into writing. P. W. 9, had not even ascertained from any one regarding the price of M. O. I. before entering into the transaction. While in the Court, he had deposed that he had kept M. O. I. on pledge, he had stated to the Investigating Officer that the persons who had brought the wrist-watch asked him to purchase it at Rs. 200/- and he agreed to purchase the same at Rupees 150/- P. W. 3 had not stated that P. W. 9 had handed over M. O. I. to him and that the police officer seized it from him. On the other hand, his statement was that on July 28, 1980, while he was at Kuakhia Bazar, the police authorities seized the wrist-watch from P. W. 9 at Kuakhia Bazar who produced it by bringing it from his house.

According to this witness, P. W. 9 had then been detained by the police authorities at Kuakhia Bazar and on being asked by P. W. 9, his brother had handed over M. O. I to P. W. 9 from whom the police authorities seized it. .This was at variance with the evidence of P. W. 9. The brother of P. W. 9 who had brought out the wrist-watch had not been examined. The evidence of P. W. 10, the police officer, was that he seized the wrist-watch at Kuakhia Bazar on production by P. W. 9. There was no evidence that P. W. 9 had informed any one after keeping the wrist-watch that he had kept it on pledge from the two persons. In view of these facts and circumstances, it would not be safe and proper to accept the evidence of P. W. 9 and hold that the two appellants had pledged M. O. I. with him. The learned Standing Counsel has submitted that there was no reason as to why P. W. 9, would implicate the two appellants. It is no part of the duty of the defence to explain as to how and why some witnesses had deposed against the accused persons and the evidence of P. W. 9 was not to be accepted merely because it

had not been shown as to why he should implicate the two appellants.

16. For the aforesaid reasons, I find that the charge had not been brought home to any of the appellants and they were entitled to an acquittal. In the result, the appeals are allowed and the order of conviction and sentence passed against each of the appellants is set aside. The appellants be set at liberty forthwith unless otherwise required to be detained.

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