

Shamshad Ali @ Shamshad and ors. Vs. the State

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Court : Delhi

Decided On : Jul-16-1984

Reported in : 1984(2)Crimes359; 28(1985)DLT66

Judge : D.R. Khanna, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 399; [Arms Act, 1959](#) - Sections 25; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 161

Appeal No. : Criminal Appeal Nos. 164, 178 and 232 of 1983

Appellant : Shamshad Ali @ Shamshad and ors.

Respondent : The State

Advocate for Pet/Ap. : I.U. Khan and; D.R. Sethi, Advs

Judgement :

D.R. Khanna, J.

(1) These are three appeals arising out of a single judgment delivered by Shri V.B. Bansal, Additional Sessions Judge. Delhi on 30.7.1983. The fourth accused Abdul Aziz who was as well convicted Along with these appellants, has not chosen to file any appeal as he was given the benefit of probation.

(2) The convictions were under section 399 and 402 Indian Penal Code . Each of the three appellants now before the court was convicted to undergo rigorous imprisonment for a period of four years under each of the counts, Mustkin who had a dagger with him, was further convicted under section 25/54/59 of the Arms Act, and required to undergo rigorous imprisonment for 1' year.

(3) Briefly stated the prosecution case was that on the night of 25th and 26th October, 1980, Harbans Singh Inspector of Police received an information that accused persons were likely to assemble near a deserted well in Paschimpuri, Delhi. He therefore, organized a raiding party. They were divided into three groups and required to hide themselves behind deep bushes existing around the well. Shortly thereafter the accused persons started coming there. By 1.00 a.m. at night, the three appellants Abdul Aziz and Abid Behra came there. Din Dayal was said to be possessed of a country made pistol, while Abdul Aziz and Mustkin each had one dagger. Shamshad Ali was carrying one iron rod and a torch, while Abid Behra who is absconding, had a lathi in his hand. None of these persons noticed the presence of the police behind the bushes there. They then had a talk to the effect that they would commit dacoity at a house the backside of which opened in a vacant space, and that whatever was recovered should be collected. One of them also stated that if the persons sleeping there awoke, he would fire a shot with his revolver and then everyone should ensure that nobody was caught at the spot. This was irrespective of whether they were able to carry any booty with them or not.

(4) As soon as this talk had taken place amongst the persons assembled, there, they wanted to proceed ahead Harbans Singh Inspector then gave a signal to the different police groups hiding there. They all came out and pounced upon the dacoits. They were caught there and then.

(5) The learned Additional Sessions Judge has after considering the evidence that has been led before him held that the charge was fully brought home to the accused persons. The conviction and sentences as aforesaid followed.

(6) During the course of the hearing of these appeal a number of infirmities in the prosecution case have been brought out by Mr. I.U. Khan, the appellants counsel

Firstly, it is pointed out that the only independent witness who was associated with the raid, namely, Prem Bahadur, was not produced. That apart, Harbans Singh Inspector who headed the raiding party and who had received the secret information and had given the singal, was also not tendered. There were in all 9 witnesses examined, five of whom were in the raiding party. Surprisingly of these five witnesses, three were not examined at the stage of investigation, and their statements under section 161 Cr.P.C. were not recorded. There is, thereforee force in the contention of the appellants that they were prejudiced inasmuch as they were not aware of what these persons had stated during the course of investigation. They were thus required to any cross-examine them without any background of their previous statements. Of the two remaining witnesses who formed part of the raiding party, Ramesh Kumar, Sub Inspector, who also happens to be the Investigating Officer, admits that he was about 50 paces away from the place where the accused persons assembled and had the said talk. It is difficult to expect that he would have heard the talk taking place from that long distance. The persons who were planning to commit dacoit would not be talking in loud voices. If they could choose a lonely forsaken place, they could as well have taken precaution of at least talking in whispers. Thus there is left the evidence of one constable Public Witness . 1 Bharat Singh only, who claims that he was hiding at a distance of about six feet from the well where the dacoits had assembled. The question to be considered is whether the conviction can be sustained on the testimony of this witness only. I have made mention of the significance of his evidence as the intention of the accused persons to commit dacoity could be reflected from the talk they had at the spot, A mere assembly of some persons at a spot even if armed, would not lead to necessary inference that they were out to commit decoity. The prosecution too has primarily relied upon the talk that took place between them in order to bring out an intention to commit dacoity. It is as such that Bharat Singh constable's evidence becomes relevant. I am afraid it will be hazardous to base the conviction on his sole testimony specially when the prosecution could have as well produced Harbans Singh, Inspector, and the Independent witness Prem Bahadur. There is besides no Explanationn for not recording statements under section 161 Cr.P.C. of the three witnesses, as aforesaid. Mr. D.R. Sethi appearing for the state, state that the F.I.R. was quite

exhaustive and since the entire facts were given therein, the absence of the statements of these witnesses should not be given undue importance. In my view however, the exhaustive nature of the F.I.R. does not obliterate the necessity of proper investigation. Such investigation necessarily requires the recording of statements of the witnesses unless they were to known's or unavailable. In the absence of the recording of such statements the accused is certainly likely to be prejudiced as he is handicapped from knowing what the witness had stated shortly after the occurrence.

(7) Another significant fact which has emerged in the present case is that the recovery of revolver from Din Dayal has not been established on record and he has been acquitted of the offence under the Arms Act, Mr. I.U. Khan has from this circumstance, asserted that the investigation cannot be treated as untainted Rather on attempt to plant the revolver was made on Din Dayal which however could not be substantiated at the stage of trial.

(8) In the talk which the dacoits allegedly had on the well, there was no specification of the place where the dacoity was to be committed. It was only mentioned that it was having vacant space on the backside. There is no evidence to show that any such property existed nearby which would be the place of target for the dacoits to commit the offence.

(9) With this state of evidence on record, I am unable to sustain the conviction of the convicts. The appeals are allowed and they are acquitted.