

Babu Lal Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Jul-07-1994

Reported in : 1994CriLJ3531; 1995(1)WLC734

Judge : B.R. Arora, J.

Acts : Indian Arms Act, 1959 - Sections 3, 4, 25 and 27; [Indian Penal Code \(IPC\), 1860](#) - Sections 148, 149, 395, 397, 460, 461 and 495; Code of Criminal Procedure (CrPC) - Sections 428

Appeal No. : Criminal Appeal No. 433 of 1993

Appellant : Babu Lal

Respondent : State of Rajasthan

Advocate for Def. : C.R. Jakhar, Public Prosecutor

Advocate for Pet/Ap. : V.S. Choudhary,; B.N. Calla and; N.K. Bohra, Advs.

Judgement :

B.R. Arora, J.

1. These three appeals arise out of the judgment dated 1-10-1993, passed by the Judge, Special Court, S.C./S.T. (Prevention of Atrocities) Cases, Jodhpur, by which the learned Judge of the Special Court convicted accused-appellant Shahid

Ali, Yogiyeswar Singh, Babu Lal and Suleman for the offences under Sections 148, 395 and 461, 149, I.P.C. and accused Shahid Ali and Yagiyeswar Singh were, also, convicted for the offence under Section 397/149, I.P.C. in addition to the aforesaid offences. Accused Shahid Ali was, also convicted for the offence under Section 27 of the Arms Act. All the accused were sentenced to undergo one year's rigorous imprisonment and a fine of Rs. 200/- and in default of payment of fine further to undergo 1 1/2 months simple imprisonment for the offence under Section 148, I.P.C; seven years rigorous imprisonment and a fine of Rs. 2000/- and in default of payment of fine further to undergo six month's rigorous imprisonment for the offence under Section 395, I.P.C; five years' rigorous imprisonment and a fine of Rs. 500/- and in default of payment of fine further to undergo two months' simple imprisonment for the offence under Section 460/149, I.P.C. Accused-appellants Shahid Ali and Yagiyeswar Singh were, also, sentenced to undergo eight years' rigorous imprisonment for the offence under Section 397, I.P.C. Accused-appellant Shahid Ali was, also, sentenced to three years' rigorous imprisonment and a fine of Rs. 500/- and in default of payment of fine further to undergo two months' simple imprisonment for the offence under Section 27 of the Arms Act.

2. Appellants Shahid Ali, Suleman, Babu Lal, Yagiyeswar Singh and Jagveer Singh along with co-accused Dhannu Khan, Naneh Khan and Premiya were tried by the learned trial Court for the offences under Sections 148, 395, 397, 460/149, I.P.C. and Sections 3/25, 4/25 and 27 of the Arms Act. The case of the prosecution is that in the night intervening 10/11 December, 1991, a dacoity was committed by the five appellants and three other accused in the temple of Nimbeshwar Mahadeo situated in Nimba-Nimdi, Mandore, Jodhpur. PW 2 Budh Giri was, at that time, sleeping in the Surya temple of Nimba Nimdi and was engaged in doing the Poojapath and was looking after the temple. PW 3 Bai Ram was doing the prayer in the temple of Nimbeshwar Mahadeo at about 12.00 in the night when the accused persons entered into the temple, threw some eatables to the dogs and tried to open to the iron-fenced door (Jaafri) of Nimbeshwar temple. On this, Bai Ram called Budh Giri. When Budh Giri tried to come from the Surya temple, four persons interrupted him and gave him beatings and four persons entered into the temple and one person caught hold of her by neck while the other

asked her to disclose the whereabouts of the valuable. She showed them the place where the money was lying. The accused took; away the money and came outside the temple. The person, who had caught hold of Budh Giri, inflicted injury to him. She came out of the temple but by that time the accused had' run away. While running away, the accused fired in the air. The prosecution, in support of its case, examined eighteen witnesses while the accused did not examine any witness in their defence. The learned Judge of the trial Court, after trial, convicted and sentenced the accused-appellants as stated above and acquitted the other co-accused. It is against this judgment, dated 1-10-1993 that the accused-appellants have preferred these three appeals.

3. It is contended by the learned counsel for the appellants that there is no evidence available on record connecting the appellants with the crime and they have been falsely implicated in this case. The identification parade held by PW 17 Mr. Mangi Lal Gaur - the learned Munsif and Judicial Magistrate - was not held in accordance with law and the accused were not properly identified by these witnesses, and, therefore, no reliance can be placed on this identification, particularly in the circumstances when the incident took place in the night and there was no possibility of identification of the accused by these witnesses when they were under the fear of death. It has also, been contended by the learned counsel for the appellants that the recovery of the so-called incriminating articles is also, of no help to the prosecution because these articles were not got identified by any of the witnesses. It has also, been contended that the witnesses have not given any description of the dacoits either in the F.I.R. or in their statement recorded by the police during the investigation nor any identification marks, like the structure, colour etc. of the accused has been mentioned/disclosed and in the absence of such description of the. accused, the appellants cannot be convicted merely on the basis of their identification in the identification parade or their indentification in the trial Court. It has also, been; contended by the learned counsel for the appellants that the case of the present appellants is similar to the case against the three other co-accused who have been acquitted by the learned trial Court and as such the prosecution has not been able to prove the case against the accused-appellants beyond a reasonable manner of-doubt and the appellants, therefore, deserve to be acquitted. It has also, been contended by the

learned counsel for appellant Yagiyeshwar and Shahid Ali that no offence under Section 397, I.P.C. has been made out against these appellants and they have been wrongly convicted and; sentenced for this offence. The learned Public Prosecutor, on the other hand, has supported the judgment passed by the Court below and submitted that the learned trial Court, while convicting the appellants, has considered the evidence, produced by the prosecution, in the right perspective and rightly convicted and sentenced the appellants and no interference is called for.

4. I have considered the submissions made by the learned counsel for the parties.

5. Before dealing with the contentions, raised by the learned counsel for the parties, I would first like to consider the nature of the evidence produced by the prosecution. The prosecution, in support of its case examined eighteen witnesses. PW 1 Deo Kishan, PW 4 Ranchod Singh, PW 5 Hari Ram, PW 6 Santosh Kumar, PW 8 Jai Shanker Joshi, and PW 9 .Sukha Ram are the Motbir witnesses to the recoveries and the inspection of the site etc. PW 1 Deo Kishan is the witness to Ex. P1 Haalat-Moka, Ex. P2 Naksha - Moka and the recovery of the empty cartridge from the place of the occurrence, the recovery of the blood-smeared soil vide Ex. P4 and the recovery of the blood-stained Tehmat of Budh Giri vide Ex. P.4 as well as the recovery of one silver chain and pendent. PW 8 Jai Shanker Joshi is the witness to the recovery of Baniyan of Budh Giri and PW 9 Sukha Ram is the witness to the arrest of the accused and the recovery of the articles from them. The other witnesses to the recovery, viz. PW 4 Ranchor Singh, PW 5 Hari Ram, PW 6 Santosh Kumar and PW 9 Sukha Ram, who were the witnesses of the recoveries of various articles of the offence, made on the information and at the instance of the accused, have not supported the prosecution case and they have been declared hostile. PW 2 Budh Giri and PW 3 Bai Ram are the two eye witnesses of the occurrence. PW 7 Bhanwar Singh, Constable, PW 10 Budh Singh Constable, PW 11 Virendra Singh, PW 12 Ramesh Prasad, PW 13 Biram Singh, PW 17 Jankinandan, PW 15 Dr. N.S. Kothari, PW 16 Prema Ram S.H.O. and PW 18 Mangi Lal Vaishnava are the police witnesses excepting Dr. N.S. Kothari, whose evidence is with respect to medical examination. PW 7 Bhanwar Singh is the witness of the recovery of the Lathi from accused Jagveer Singh vide Ex. P 12,

from accused Suleman vide Ex. P13 and from accused Ba'bu Lal vide Ex. P. 14 and the arrest of accused Premiya vide Ex. P 15 PW 10 Budh Singh was posted as Constable at Police Station, Mandore, on 11-12- 991. PW 15 Mangi Lal was the Investigating Officer who conducted the investigation, arrested the accused and presented the challan. Ramesh Prasad and Budh Singh were the Incharge of the Malkhana, in whose possession the articles remained in the sealed condition. PW 14 Jankinandan took the articles in the sealed cover from Ramesh Prasad for F.S.L. examination to the State Forensic Science Laboratory, Jaipur. Virendra Singh was the Constable working in the Office of the Superintendent of Police, Jodhpur, who, after receipt of the articles, prepared a forwarding letter and handed it over to Jankinandan, who took these articles and deposited the same in the Laboratory at Jaipur. PW 16 Dr. N.S. Kothari was the Medical Jurist at M.G. Hospital, Jodhpur, who examined the injuries found on the person of Budh Giri and Bai Ram. PW 17 is Mr. Mangi Lal Gaur, the then Munsif and Judicial Magistrate, Jodhpur, who conducted the identification parade in the Central Jail, Jodhpur.

6. Now, coming to the arguments raised by the learned counsel for the appellants. The first contention, raised by the learned counsel for the appellants is that it was a dark night and, therefore, it was not possible for the witnesses PW 2 Budh Giri and PW 3 Bai Ram to have identified the accused-appellants and particularly in the facts and circumstances when according to the prosecution case, the accused came with the muffled faces. PW 3 Bai Ram has specifically stated that at the time when the dacoity took place and eight accused entered in the temple, all the lights in the temple were on and they identified the accused in the light and though the accused were in muffled faces but in the scuffle, the clothes on their face came down and, therefore, she could identify the accused. The statement of PW2 Budh Giri is, also, to the same effect and he has stated that the accused switched-off the lights of Surya temple but so far as the lights at other places are concerned, they were on and, therefore, in the presence of the. light it was possible for these witnesses to have identified the accused. The contention, raised by the learned counsel for the appellant, is, therefore, devoid of any force.

7. The next contention, raised by the learned counsel for the appellants is that the witnesses were under the threat of death and, (therefore, it was not possible for

them to have identified the accused and remember their faces at the time of identification parade and thereafter in the Court. Both the witnesses had seen the accused from a very close distance and that too in the light. It depends from person to person to keep in the memory the picture of a particular person for considerably a long time. Though they were under the threat of death but these witnesses had seen the accused from a very close proximity and remembered their features and got them identified at the time of identification parade held by PW 17 Mr. Mangi Lal Gaur and, therefore, it was possible for these witnesses to have identified the accused during the identification parade as well as in the Court. The contention, raised by the learned counsel, for the appellants, is, therefore, devoid of any force.

8. The next contention, raised by the learned counsel for the appellants is that no identification marks or particulars of the height, structure etc. were given either in the F.I.R. or in the statements of the witnesses and, therefore, in the absence of these identification marks or the structure etc. of the accused or the description of the dacoits, the witnesses would not have been able to identify the accused during the identification parade. The witnesses had seen the accused from a very close proximity. They have their structure in their mind and they rightly identified the present appellants during the identification parade held by the learned Magistrate as well as during the trial. Merely because the description of the dacoits have not been given, the evidence of the witnesses, who were admittedly present there and had seen the accused, cannot be disbelieved, particularly when their evidence inspires confidence and their statements find corroboration from the earlier identification parade held by PW 7 Mr. Mangi Lal Gaur.

9. The next ground raised by the learned counsel for the appellants is that the identification parade, held by PW 7 Mr. Mangi Lal Gaur was not in accordance with the law. Learned counsel for the appellants have not been able to show what illegality has been committed by the learned Magistrate in conducting the identification parade. The persons of similar structure and height were mixed with the accused in the jail. The accused were never shown to the witnesses prior to their identification. Reasonable number of other similar persons were mixed with the accused and they were allowed to stand at different places and not collectively

at the same place. The witnesses correctly identified these accused-appellants in the identification parade. No illegality appears to have been committed by the learned Magistrate in conducting the identification parade. He has taken all the precautions which are required to be taken at the time of holding identification parade. The identification parade of the accused-appellants, held by PW 17 Mr. Mangi Lal Gaur does not suffer from any infirmity or illegality.

10. The next contention, raised by the learned counsel for the appellants is that the learned lower Court has committed an error in placing reliance over the alleged recoveries made from the accused on their information and at their instance. The articles recovered from the accused on their information and at their instances, are not supported by the Motbir witnesses of the recovery. The articles have not been got identified from the witnesses in the Court. In the absence of any such evidence that these articles were recovered from the accused or on their information or at their instance, this evidence cannot be read against the accused-appellants as an incriminating circumstance connecting them with the crime. The so-called recoveries, therefore, do not connect the accused with the crime as they neither stand proved from some independent evidence nor they connect the accused with the crime as none of the Motbir witnesses has stated that these are the articles which were recovered from the accused. The learned trial Court, therefore, committed an illegality in considering this evidence against the appellants and connecting them with the aforesaid crime.

11. The case of the prosecution mainly rests upon the statements of two eye-witnesses, viz., PW 2 Budh Giri and PW 3 Bai Ram, who identified the accused-appellants during the identification parade held by PW 17 Mr. Mangi Lal Gaur and in the trial Court, also. PW 2 Budh Giri has stated that in the intervening night between 10/11 December, 1991 he, after taking his meals at about 10.00 p.m., went to Surya temple and slept there and Bai Ram slept in the Mahadeo's temple. At about 1.30 a.m. he was awakened by the voice of Bai Ram, who was calling him and was crying at a high pitch. On being awakened, he saw three persons breaking the iron-net of Mahadeo's temple where Bai Ram was sleeping. He proceeded towards that side. The three persons started giving beatings to him. Accused Premiya inflicted injury by a Lathi which hit him on the arm. He tried to

inflict another injury by the Lathi but he caught hold of the Lathi. Accused Prem and Bahu Lal tried to snatch the Lathi from him. He went towards the pipal tree. Four-five persons were there, who were in muffled faces. They tried to catch-hold him and during the scuffle the other persons, who were in muffled faces, came there, the clothes on their mouth came down and he saw the accused. The other accused were Jagiyeshwar, Dhanka and Jagveer Singh. Dhanka was, also, armed with a revolver. Thereafter accused Suleman caught-hold of his hair and accused Shahid Ali inflicted fisty-blow on his stomach and Naneh Khan inflicted injury with a Lathi while Yagiyeshwar inflicted injury by a dagger. He raised alarm 'save me save me', whereupon the accused threatened him of dire consequences. He thereafter fell down on the ground and his Tehmad open, by which his hands were tied by the accused. Sometime thereafter Bai Ram came and opened his hands. This witness could not identify Naneh Khan, Dhannu Khan, Premiya and the accused-appellant Babu Lal in the identification parade held by PW 17 Mr. Mangi Lal Gaur.

12. PW 3 Bai Ram has stated that in the night of the incident, Budhi Giri and she was in the temple. At about 12.00 hours in the night she was offering the prayers in the Mahadeo's temple. Budh Giri was sleeping in the Surya temple. The iron-net was closed from inside where she was offering the prayer. The accused came there. Four persons came in the Mahadeo's temple and tried to open the iron-net gate, upon which she raised an alarm. Budh Giri woke-up and tried to come to Mahadeo's temple and the four persons caught hold of him. Shahid Ali caught hold her neck and the other persons asked her to disclose the whereabouts of the valuables. She further stated that she requested the accused not to kill her and showed them the place where the money was lying. The accused tookaway the valuables lying there. The other four accused, who caught hold of Budh Giri inflicted a dagger blow to Budh Giri. When the accused went away, she came out of the temple and attended Budh Giri. This witness has, also, stated that some of the accused were muffled faces and some were with naked faces and she identified all the accused in the Court. She has admitted that she could identify only four accused before the learned Magistrate, viz., Suleman, Shahid, Babu Lal and Premiya and could not identify the other accused persons. PW 17 Mr. Mangi Lal Gaur - the learned Magistrate, who conducted the identification parade on 9-1-

92 in the Central Jail Jodhpur, has stated that PW 2 Budh Giri correctly identified Yagiyeshwar Singh Suleman and Jagveer while PW 3 Smt. P Ram could identify Shahid, Dhannu Khan, Babura and Mahesh. Both these persons could, therefore, identify the present five appellants during the identification parade well as in the trial Court and the identification of these five appellants by these two witnesses, who had seen these accused from a close proximity and in the Court, thus, stands corroborated by the identification parade, and, therefore, on the basis of the statements of these three witnesses, i.e., PW 2 Budh Giri, PW3 Bai Ram and PW 17 Shri Mangi Lal Gaur, it stands established that the five appellants were the persons who committed the dacoity at the Nimbeshwar Mahadeo temple, Nimba Nimdi, Mandore, Jodhpur, in the night intervening 10/11th December, 1991, and they have rightly been convicted by the learned trial Court for the offences under Sections 148 and 460/149, I.P.C. as these offences stand proved against him.

13. The next contention, raised by the learned counsel for the appellants is that the Case against the present appellants and that against the other co-accused Nanhe Khan Dhannu and Premiya, is the same and the appellants have been discriminated and connected with the crime while the aforesaid three co-accused, similarly situated, have been acquitted. The other three accused were not got identified by these witnesses during the identification parade or in the Court and, therefore, they were given the benefit of doubt. But the present appellants were got identified by the witnesses during the identification parade held by PW 17 Mr. Mangi Lal Gaur and, therefore there is no question of any discrimination against the accused-appellants and they were rightly convicted by the learned trial Court.

14. The next contention, raised by the learned counsel for the appellants is that no case against accused-appellant Shahid and Yagiyeshwar Singh for the offence under Section 397, I.P.C. is made out, and they have been wrongly convicted and sentenced by the learned trial Court. The learned trial Court, while convicting these two accused-appellants for the offence under Section 397, I.P.C, placed reliance over the recovery of the revolver (Deshi Katta) recovered from accused Shahid Ali, which was used by him in the course of dacoity for threatening PW 3 Bai Ram. PW 3 Bai Ram, in her examination-in-chief has nowhere stated that she was threatened by these accused persons on the pistol-point. She has merely

stated that accused Shahid Ali caught hold of her neck and asked her to disclose the whereabouts of the valuables. The recovery of the revolver (Deshi Katta) does not connect the appellant with the crime and it has not been believed by the learned trial Court. The accused-appellant, while committing the robbery did not use the Deshi Katta for threatening the witnesses nor any grievous injury was caused by the appellant in this case. PW 2 Budhi Giri received only simple injury and no deadly weapon was used by these accused-appellants while committing the dacoity and, therefore no case for the offence under Section 397, I.P.C. is made out against appellants Shahid Ali and Yagiyeshwar Singh. The learned lower Court was, therefore, not justified in convicting and sentencing appellants Shahid Ali and Yagiyeshwar Singh for the offence under Section 397, I.P.C.

15. The next contention, raised by the learned counsel for the appellants, which requires consideration is: whether the appellant Shahid Ali has been rightly convicted by the learned trial Court for the offence under Section 27 of the Indian Arms Act. The recovery of the Deshi Katta (pistol) from the possession of the accused or on the information and at the instance of accused-appellant Shahid Ali has not been proved. This incriminating circumstance has wrongly been relied upon by the learned trial Court against the accused-appellant. As per the statement of PW 3 Bai Ram this accused has not used the Deshi Katta and he only caught hold her neck and, therefore, appellant Shahid Ali was wrongly convicted for the offence under Section 27 of the Arms Act. The conviction of the appellants for the offences under Sections 148, 495, 460/149, I.P.C, are therefore; maintained but the conviction and sentence of accused Shahid Ali and Yagiyeshwar Singh for the offence under Section 397, I.P.C are set aside.- Accused-appellant Shahid Ali is, also, acquitted of the offence under Section 27 of the Arms Act.

16. The last question which requires consideration In the present case, is what should be the sentence which should be imposed against the accused-appellants and whether the sentence passed by the learned lower Court requires any interference? So far as the sentence imposed by the learned trial Court on the appellants for the offences under Sections 148 and 460/149, I.P.C. are concerned, the same do not require any interference as a lenient view has already been taken

by the learned trial Court. But so far as the substantive sentence awarded by the learned trial Court to the appellants for the offence under Section 395, I.P.C. is concerned in the facts and circumstances of the case, I think that the sentence of five years' rigorous imprisonment will meet the ends of justice, as the appellants have already suffered a lot.

17. In the result, the appeals, filed by the appellants, are partly allowed. The conviction and sentence of the appellants, so far as the offences under Sections 148 and 460/149, I.P.C. are concerned, is maintained. The conviction of all the accused-appellants for the offence under Section 395, I.P.C. is maintained but their substantive sentence is reduced from seven years' rigorous imprisonment to five years' rigorous imprisonment but the sentence of fine is, however, maintained. The conviction and sentence of appellant Shahid Ali and Yagiyeshwar Singh for the offence under Section 397, I.P.C. is quashed and set aside and both these appellants are acquitted of this offence. Appellant Shahid Ali's appeal against his conviction and sentence for the offence under Section 27 of the Arms Act is allowed and his conviction and sentence for this offence are set aside and he is acquitted of this offence. All the appellants are entitled for the benefit of set-off as per the provisions of Section 428, Cr. P.C.