

Birbal and ors. Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Apr-29-1988

Reported in : 1988(2)WLN114

Judge : Surendra Nath Bhargava and; Gopal Krishna Sharma, JJ.

Appeal No. : D.B. Cr. Appeal No. 15 of 1985

Appellant : Birbal and ors.

Respondent : State of Rajasthan

Disposition : Appeal allowed

Judgement :

Gopal Krishna Sharma, J.

1. This appeal has been preferred against the judgment dated 18th December, 1984, passed by the Sessions Judge. Tonk, convicting and sentencing the accused appellants as under:

Name of accused d Offence Under PunishmentAll accused persons Section 148, I.P.C. 3 years' RI and a fine' of 100/-, and in default1 month's RI;' 395/397 or 7 years' RI;396/397, I.P.C.' 302 or Life imprisonment and302/149, a fine of Rs. 200/, and inI.P.C. default, 2 months' RI;' 396 or Life imprisonment and396/149, a fine of Rs. 200/-, and inI.P.C. default, 2 months' RI;397, I.P.C. 7 years' RI;Birbal,

Ramnarayan, 460, I.P.C. 10 years' RI and a fine of Dhari, Binda alias Fulgan Rs. 200/-, and in default, 2 months' RI.

All the substantive sentences awarded to the accused-appellants, were, how ever, ordered to run concurrently.

2. On 7th April, 1984, on Mannalal Sarpanch, Gram Panchayat Bagrwa submitted a written-report at PS-Piplu; to the effect that some miscreants had committed dacoity at the house of Bhanwarlal son of Madholal, at village Naurangpura, on the intervening night of 6th and 7th, and that in that dacoity, the property of Bhanwarlal had been looted. According to the report, Bhanwarlal was not present in the village, at that time. The informant mentioned in the report that when Bhanwarlal would return to village a list of his stolen articles, would be submitted. Bhanwarlal's son Ramgopal was present, and he told him that his transistor of 2 bands of Jemco-make and 10-15 silver coins had been taken away by the dacoits. In the report, he also mentioned that Ramgopal and other villagers, namely, Shivratan Singh, Laxmansingh, Ramkaran, Nanda and Bhagwana had also arrived there. They gave warning to those miscreants, and thereupon, the latter started giving blows by lathis and knives In that occurrence, all the persons were injured, and particularly, the condition of Bhagwana was not good. He also mentioned in the report that one lantern was burning outside his shop, and that Ramgopal and a few other persons then followed the miscreants in a tractor. The villagers had seen those dacoits very well, in the light of the lantern, and they could identify them.

3. The above report was submitted at about 10.30 a.m. on 7th April, 1984, and on the basis of this report, a case under Section 395, I.P.C. was registered.

4. The injured persons were sent to hospital. Some time thereafter, Bhagwana died at the SMS Hospital, Jaipur. The case was then converted into that under Sections 302/396, I.P.C. During investigation, the accused persons were arrested by the police. Birbal and Pulgan were arrested on 17th April, 1984 while the other six accused persons were arrested on 8th April, 1984. The police also recovered some minor articles from possession of some of the accused persons. Identification-parade was also conducted by the Magistrate, and the accused-appellants were identified by the prosecution witnesses.

5. After completing usual investigation, a challan was submitted.

6. The trial court framed charges against the accused persons under Sections 147, 148, 397, 397/149, 302, 302/149, 396, 396/149, 395, 395/149, 459 and 460, I.P.C. The accused persons pleaded not guilty and claimed trial.

7. The prosecution examined 16 witnesses to prove its case. The accused persons also examined 1 witness in their defence. After concluding the trial, the trial court found the appellants guilty and sentenced each of them as mentioned above.

8. The learned Counsel for the appellant argued that the conviction of the appellants is illegal and not based on proper appreciation of evidence. According to him, their conviction is based on the identification of the accused persons, and that the identification-parade was not conducted properly. The accused persons were shown to the prosecution witnesses prior to the identification-parade, and hence, the said identification-parade has no substantial value. It was also argued by him that on the date of the incident, there was dark night and it was not possible for the witnesses to see the faces of the accused persons. He further argued that according to the prosecution some fingerprints were taken from some articles alleging that they are of accused Binda and Jogender, but the fingerprint-documents have not been exhibited, nor is there any report of any fingerprint expert, but the learned Sessions Judge based his judgment on the fingerprints taken by the police. It was also argued that some of the police-officials whose names have been mentioned in the list of witnesses and who belong to the Newai Police Station and who arrested the accused persons, have not been examined. The recovery of the transistor and other articles was also challenged by him. It was also argued by him that the identification-parade was conducted after a long delay, and that according to the prosecution, there were fingerprints on the 'Lota' and 'Gilas' the recovered articles of accused Binda and Jogender, but no question was asked from these accused persons, during their statements under Section 313 Cr. P.C. And, lastly, it was argued that the story of the lantern burning outside the shop of Mannalal Sarpanch is a made out one, and should not be believed.

9. The learned Public Prosecutor, on the other hand, supported the judgment of the trial court and argued that in the FIR, it has been mentioned that a lantern was burning outside the shop of Mannalal. It was also argued by him that at the time of seeking remand of the accused persons, the police mentioned in the form that the accused persons be kept 'Ba-Parda' (muffled-face), and so, there was no question of showing the accused persons to the prosecution witnesses. It was also argued by him that there was no delay in conducting the identification-parade.

10. We have considered the arguments advanced by both the learned Counsel and have also gone through the entire record of the case including the testimony of the prosecution witnesses.

11. The first point to be seen is whether there was any lantern burning outside the shop of Mannalal, or at the house of Bhanwarlal where the dacoity took place, and whether the accused persons had torches in their hands on account of which, the witnesses could identify them. Ex. P.10 is the written-report submitted by Mannalal; and Ex. P.11 is the regular FIR prepared on the basis of the said written-report (Ex. P.10). In the report, it has been mentioned that a lantern was burning outside the shop of the informant. After receiving the report from Mannalal, his statement under Section 161, Cr. P.C. was recorded on 7th April, 1984. The purpose for recording statements under Section 161, Cr. P.C. is that during investigation, some other information is received from the witnesses. This statement under Section 161, Cr. P.C. is in addition to the regular report. No doubt, a person who is the informant, corroborates the FIR, but, in addition to that report, he gives some further information. In the present case, what we find is that Mannalal is the informant who gave the written-report (Ex. P 10). His statement under Section 161 Cr. P.C. was also recorded, which is marked Ex. D 3. Comparing the report (Ex. P 10) to his statement (Ex. D 3), we find that his statement (Ex. D 3) is a verbatim-copy of the written-report (Ex. P 10), and not a single word was added to the statement (Ex D 3). So, the statement of Mannalal under Section 161, Cr. P.C. (Ex. D 3) is not a statement, but simply a copy of the report (Ex. P 10). What we find is that the other prosecution witnesses have not stated that Mannalal Sarpanch was also present at the time of he dacoity, but, Mannalal, in his statement, has stated that he was at his house, and had

witnessed the entire dacoity very minutely. He has stated that Ram Gopal and other villagers had come there and were beaten up by the miscreants. He has further stated that out of 8 accused persons, 5 had entered the house of Bhanwarlal and 3 had remained outside. He identified those 8 persons from his house by not coming outside. All this statement indicates that this witness is a liar of first grade. He could not have seen any incident from inside his house. Had it been a fact that he was witnessing the incident and had seen that the villagers had arrived there and were fighting with the miscreants, and even then he would not come out of his house, cannot be believed. Another important thing is that he is the informant, and on his report, the police came to village and inspected the site and prepared site-plan (Ex. P 12). Mannalal, the informant of the report (Ex. P 10) was also present, when the site-plan (Ex. P 12) was prepared. He has signed it at place marked A to B. In this site-plan, it has not been shown to where the lantern was burning at the shop of Manna Lal. It has also not been shown where the lantern was burning inside the house of Bhanwar Lal. In his report (Ex. P 10), Mannalal has very specifically mentioned that a lantern was burning outside his shop. When this fact was so important that he and the other villagers had identified the dacoits only in the light of lantern which was burning outside his shop, then, it was very important for the SHO to have shown in the site-plan as to at what place the said lantern was burning. This is a very important aspect which should have been shown in the site-plan (Ex. P 12), so that, the court could have come to a conclusion whether it was possible for the prosecution witnesses to have identified the miscreants in the light of that lantern Ram Gopal PW4 has also stated in his statement that a lantern was burning at his house also, and in the light of that lantern, he had seen that 5 persons had entered the house of Bhanwar Lal and looted the property. No other witness has stated that any lantern was burning at the house of Ram Gopal PW 4. Then Mannalal has not stated that there was any light of lantern inside the house of Bhanwar Lal or Ram Gopal. None of the witnesses has stated in his examination-in chief that there was any lantern burning outside the shop of Mannalal, but, very strange and unfortunate that in cross-examination, a question was put about, and the witnesses stated that a lantern was burning there.

12. Laxman Singh PW 2 also in his cross-examination has said about a lantern, but, in his statement recorded under Section 161(Ex. D. 1), he has not stated that any lantern was burning at the house of Mannalal. So, what comes out is that the theory of burning of lantern outside the shop of Manna Lal is a concocted story, and in order to identify the accused persons, the prosecution witnesses were made to say like this. Therefore, the aspect of burning of lantern is unbelievable and false story.

13. Another aspect is that the prosecution witnesses have stated that the miscreants had torches in their hands, and that they could identify them in that light also. This is also unbelievable that the dacoits who would come in the dark night for dacoity, would throw light on their own faces, so that the people might identify them. How could it be possible? Rather the possibility was that the dacoits would like to hide their faces by putting Dhoties etc., so that they might not be identified by any one. But, in the present case, the police led evidence to the effect that the dacoits had come in open faces and were throwing torch-light on their own faces, so that they could be identified. So, this is unbelievable. Thus, we are of the opinion that the story that the witnesses had identified the accused persons in the light of lantern and torches, is an unbelievable one.

14. Much stress was laid on the identification of the accused persons. The identification-parade was conducted by the Magistrate on 12th June, 1984. Accused Birbal and Fulgan were arrested on 17th April, 1984, and the remaining six were arrested on 8th April, 1984. After their arrest, they were produced before the Magistrate for remand, on 17-4-1984, 21-4-1984 and 1-5-1984. We have seen the remand-papers. In these papers, it has not been mentioned in Column No. 6 that the accused persons were kept 'Ba-Parda'. But, what was pointed out is that in the remand-papers on 17th April, 1984 and on 1st May, 1984, the words, 'Ba-parda Sewa Mein Pesh Hat' and 'Muljiman Ba-Parda Pesh Hai' have been added subsequently. This is clear from mere perusal of the remand-papers. There is no doubt these words were added to remand-papers, later on. How and when they were so added, has not been explained by the Public Prosecutor. It means that when the accused persons were produced for remand before the Magistrate, it was not mentioned in remand-papers, that they were kept Ba-Parda.

Subsequently, when the police found that it might be against them, they put a note in a different ink on the remand papers. We have also seen some remand-papers where the words, 'Ba-Parda' have been reported inside the body in Column No. 6 of the remand-application. In some of the orders, the learned Magistrate has also mentioned that the accused persons were brought Ba-Parda, but, in some remand-orders, there is no mention of Ba-Parda, by the Magistrate. The fact is that that the word, 'Ba-Parda' was added subsequently. It shows that the accused persons were not kept Ba-Parda, and this fact heavily effects on the identification of the accused persons. It creates doubt in the correctness of the identification. As mentioned above, the accused persons were arrested on 8th April, 1984 & on 17th April, 1984, but their identification parade was held on 12th June, 1984 i.e., practically after 2 months of their arrest. The learned Public Prosecutor stated that the police submitted an application to the Chief Judicial Magistrate, for conducting identification-parade of the accused persons. That application was submitted on 9th May, 1984. So, on 9th May, 1984, the accused persons were sent to judicial-lock-up, and this identification-parade was held on 12th June, 1984. Thus, the learned Public Prosecutor argued that the delay in conducting the parade was on account of the learned Magistrate himself. After application for conducting the parade, 1 month was passed in judicial-lock-up, but still, it was a delay on the part of the police. According to the Rajasthan Police Rules, 1965, Rule 17.31 is regarding identification of suspects, and in those rules, the instructions are that identification-proceedings should be held soon after the arrest of the persons. In the present case, the accused persons were arrested on 8th April, 1984 and 17th April, 1984. So, according to the Police Rules, it was the duty of the police to have got identification-proceedings conducted immediately after the arrest of the accused persons. But, they submitted an application for identification-parade on 9th May, 1984, i.e., after 1 month of the arrest of the accused persons, namely, Binda, Jogender, Bhuneshwar, Ramnarayan, Dhari and Mangal; and after 20 days of the arrest of Birbal and Fulgan. This delay has not been explained by the learned Public Prosecutor. Why for such a long period they did not request the Magistrate for the identification-parade? In this regard, the learned Counsel for the appellants cited the cases of Hazari v. State of Rajasthan 1979 RCC 48; Yadram v. State of Rajasthan 1981 Cr. LR (Raj) 97; and Netrapal and Ors. v. State of Rajasthan etc.

1982 Cr. LR (Raj.) 119.

15. In the case of Hazari (supra), it has been observed:

It will be seen that the Investigating Officer kept Hazari in his custody for 8 days before he sent him to the judicial lock-up for test identification. It has not been explained as to why Hazari was not sent to the judicial lock-up immediately after his arrest if the test identification had to be arranged to enable the witnesses to try and identify the culprits in a test identification.

16. In the case of Yadram (supra) it was held as under:

The test identification held by the learned Magistrate at the request of the police on October 31, 1978, is of no avail. It would be reasonable to believe that all the three appellants had been shown to the witnesses by the police during the period they were in the custody of the police from September 26 to October 21, 1978. It is significant to note that Hukam Chand at whose instance FIR was registered did not give the description of any dacoit in the FIR. Gurwant Singh, the Investigating Officer further stated that none of the witnesses gave the description of any culprit in their statements under Section 161, Cr. P.C. PW Jayram also admitted that he did not give the description of the culprits to the police. Gurwantsingh has not explained in his evidence in the trial as to how he came to know that the present appellants were among the culprits and what led him to arrest them. All the circumstances mentioned above would show that the alleged identification of the appellants by the witnesses in the trial carries no evidentiary value.

17. In the case of Netrapal (supra), it was held as under:

The evidence relating to identification of Pradeep Kumar, Shivsahai, Ramswaroop, Ramesh, son of Dumber Lal and Ramesh, son of Shiv Singh, cannot be safely relied upon. It will be seen that the night of occurrence was admittedly a dark night. There was no light available in the house of the complainant at midnight when this crime was committed. No description of any of culprits is given either in the FIR or in the statements of witnesses recorded under Section 161, Cr. P.C. It is not indicated in the FIR as to how the witnesses had seen the face of any of the

culprits in the darkness of that night. It is difficult to believe the inmates of the house of Purshotam Lal Sharma that some of the culprits were having their faces uncovered at the time of the commission of the crime and that therefore they were able to see their faces in torch-light.

18. We have also perused the identification-memo (Ex. P1). According to this memo, 48 persons were mixed with the accused appellants, at the time of the identification-parade. Who were those 48 persons, have not been mentioned in the memo. This was not a correct way of conducting an identification parade. The learned Magistrate did not observe all necessary precautions, which are necessary for conducting an identification-parade. He should have mentioned the names of the witnesses and their addresses who participated in the test identification and who were mixed with the appellants, for the purpose. Without observing those formalities, which necessary precautions the identification-parade was a perfunctory proceeding, which diminished the value of the identification. Another important aspect which is also to be kept in mind is that the prosecution witnesses have not given the description of the accused-persons, either in their police-statements, or in their court-statements, by which they could identify them. The accused-persons were not known to the witnesses. Even informant Mannalal has not given any description of the persons, in the report (Ex. P 10). So, it was the duty of the witnesses to have given description and marks of their identification, at the first instance, to the Police, when they were examined under Section 161, Cr. P.C. Subsequently, they identified the accused persons. But, even at the time of identification they have not given any description or detail-marks of the accused persons, by which, they identified them. The fact that after the arrest of the appellants, for a very long period they were kept in the police custody, and the fact that they were kept in Ba-Parda, become doubtful, and in our view, the test identification in this case, has no value. Inference can be drawn that the accused persons were shown to the witnesses while they were in the police custody, before conducting the identification-parade. Hence, we agree with the argument of the learned Counsel for the appellants on the point of the identification of the accused-appellants.

19. Regarding the fingerprints of Binda and Jogender, the argument of the learned Counsel for the appellants, also has a great force. Fingerprints of these two accused were allegedly found on a 'Lota' and a 'Gilas'. Who took those prints and under whose instructions he took those fingerprints, has not been proved by the prosecution. There is no report of any expert who examined those fingerprints on the 'Lota' and the 'Gilas'. There is no proof of fingerprints of these two accused persons, but, still, the learned sessions judge has relied on this fact. We fail to understand, how the learned Sessions Judge relied on the aspect of the fingerprints of the accused-persons, without any basis of proof. Therefore, the judgment of the lower court is certainly perverse, and we can say that the learned Sessions Judge has given his finding without any basis. Therefore, on the aspect of fingerprints of the accused-persons, no conviction can be based.

20 It is not disputed that the accused persons were arrested by the Newai Police in another case under the Indian Arms Act, They were arrested Just next day of the alleged incident in this case. It is in the evidence that Ram Gopal had gone to the PS, Newai and informed them that a dacoity had taken place night. The Newai Police also chased after the accused persons, and on 8th April, 1984, they arrested 6 persons and on 17th April, 1984, 2 more persons. Who arrested them & as to under what circumstances, was to be proved by the prosecution.

21. Laxminarain, Dy. S.P., Harisingh, the SHO, PS, Newai, and Kailash Singh Constable had arrested the accused persons. A Roznamacha was prepared, and there was an entry in it, but, that entry has not been submitted nor have these Police Officials been examined by the prosecution. We fail to understand, why they were not examined. They were very important witnesses and should have been examined. So, this fact also creates a great suspicion in the prosecution story.

22. Bhanwarlal PW 1 at whose house the dacoity took place, was not present at the time of dacoity, but, he returned to village subsequently. He has been examined as PW 11. He submitted a list of the articles which were stolen away. But, that list has not been proved. No article as was stated by Bhanwar Lal PW 11, has been recovered. Of course, a transistor has been recovered. But, no

identification parade was conducted regarding the said transistor. In Court, Ram Gopal PW 4 stated that the transistor belonged to him and that the same was stolen away by the dacoits. It was very easy to say like this, in the court. Had the said transistor belonged to Ramgopal and had it been recovered from the possession of the dacoits, it was the duty of the police to have got an identification-parade conducted for the transistor, in a proper way, and they should have proved that the same belonged to Ram Gopal PW 4, which was stolen away by the accused persons, and that could be good evidence against the accused-persons. But, this has not been done. Therefore the recovered transistor does not connect the accused persons with the occurrence, and on the basis of the alleged recovery, they cannot be found guilty and convicted for dacoity and murder.

23. Regarding the fingerprints of Binda and Jogender, it was argued that no question was put to these accused persons during their statements under Section 313, Cr. P.C. This is alleged evidence against these two accused persons that the 'Lota' and the glass had their fingerprints and they were examined. So, it was the duty of the court to have put this question to these accused persons, so that they could explain the fact whether their fingerprints were taken and whether they were their fingerprints on the articles or not. But, no such question was put to them. Therefore, this evidence cannot be used against them.

24 In the case of *Hate Singh v. The State of Madhya Bharat* AIR 1953 MB 468, their Lordships of the Supreme Court, observed as under:

The statements of an accused person recorded under Sections 208, 209 and 342 are among the most important matters to be considered at a trial. It has to be remembered that in this country an accused person is not allowed to enter the box and speak on oath in his own defence. This may operate for the protection of the accused in some cases but experience elsewhere has shown that it can also be a powerful and impressive weapon of defence in the hands of an innocent man. The statements of the accused recorded by the committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness-box. They have to be received in evidence and treated as evidence and be duly considered at the

trial (section 207 and 342).

This means that they must be treated like any other piece of evidence coming from the mouth of a witness and matters in favour of the accused must be viewed with as much deference and given as much weight as matters which tell against him. Not more, Because of the presumption of innocence in his favour even when he is not in a position to prove the truth of his story, his version should be accepted if it is reasonable and accords with probabilities unless the prosecution can prove beyond reasonable doubt that it is false.

In that case, their Lordships further observed:

Trial court and High Court attaching importance to the fact that accused had absconded - Accused should have been asked question on this point and given a chance to explain it - In the absence of this, the fact, cannot be used against him.

25. In view of our above discussion, we find that the learned Sessions Judge has not appreciated the evidence on record correctly, and has not thus arrived at a correct conclusion. The entire finding of the trial court is perverse illegal and incorrect. We also feel sorry to note that the learned Sessions Judge has not been able to make out as to what offence was committed by the accused persons. He has found them guilty under Sections 395 & 397, I.P.C., and also in the alternative under Sections 395 & 397 read with Section 149, I.P.C. Similarly, he has found them guilty under Section 302, I.P.C. simpliciter. and also under Section 302/149, I.P.C., and in the same way, for offences under Sections 395 & 396, I.P.C. We fail to understand how the learned Sessions Judge has found the accused-appellants guilty and passed this conviction-order. The entire judgment is, therefore, liable to be set aside.

26. In the result, the appeal is accepted. None of the accused-appellants is found guilty of any of the offences levelled against them and as held by the learned Sessions Judge. All of them are acquitted of all the offences, for which they were found guilty by the trial court. Accused Binda, Dhari and Jogendra are in jail. They be released forthwith, if not required in any other case. Accused-appellants Birbal alias Jagannath, Fulgan alias Kishan, Bhuneshwar alias Mugneshwar,

Ramnarayan and Mangal alias Jagali are on bail. They need not surrender. Their bail-bonds are hereby discharged. And, the judgment of the trial court, is set aside.

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