

Bashir Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Aug-10-1988

Reported in : 1988WLN(UC)369

Judge : S.N. Bhargava and; S.S. Byas, JJ.

Appeal No. : D.B. Cr. Appeal No. 129 of 1986

Appellant : Bashir

Respondent : State of Rajasthan

Advocate for Pet/Ap. : Mr. Biri Singh

Judgement :

S.S. Byas, J.

1. By his judgment dated February 26, 1986, the learned Additional Sessions Judge, Deeg convicted accused Bashir under Sections 395 and 397 IPC and sentenced him to imprisonment for life with a fine of Rs 100/-, in default of payment of fine, to further undergo one month's rigorous imprisonment on each count. The accused has come up in appeal and challenges his conviction.

2. Stated in short, the prosecution case is that the dacoity took place in the houses of Pyare and Pooran Kumar in village Dabra, Police Station Pahadi, district-Bharatpur in the early hours on 28-10-1984. It is alleged that the members of the

family were sleeping in the different Kothas in that night. At about 3 or 3.30 a.m 10 or 12 miscreants intruded into the house armed with Guns, Pistols and Lathis. They had also torches with them PW 9 Pyare woke up, raised cries and called his brother Phusi for help. His brother Phusi came from the other Kotha and tried to face the miscreants. One of the miscreants fired his gun at Phusi, which hit him on the back of chest and abdomen on both sides. Phusi fell down and passed away instantaneously on the spot. His mother Angoori also came out of the Kotha and she was also shot dead by one of the miscreants. The miscreants thereafter ransacked the silver and gold ornaments lying in the house From the house of Pyare, they went to the house of PW 2 Pooran. They also ransacked his house and collected gold and silver ornaments along with clothes and cash. The miscreants also caused injuries to many of the inmates of the house. They thereafter decamped with the looted property. PW 1 Chander went to the Police Station, Pahadi and presented a written report Ex. P 1 of the occurrence at about 800 a.m. on that very day. The police registered a case and proceeded with the investigation. The Station House Officer, PW 13 Om Prakash arrived on the spot, inspected the site and prepared site-plan, Ex P 10. The post-mortem examination of the dead bodies of Smt. Angoori and Shri Phusi was conducted by PW 4 Dr. Laxman Singh, the then Medical Officer-in-charge, Government Dispensary, Pahadi. He was of the opinion that the death of these two victims was on account of gun shot injuries. He also examined the injuries of the other injured persons and issued injury report Ex.P 3 to Ex. P 7. The SHO found the empty cartridge-case lying on the spot, which was seized and sealed by him. The investigation continued but nothing concrete could come out.

3. It so happened that on 18-1-1985, an encounter took place between the police and two miscreants a few Kilometers away from Police Station, Pahadi. One of them was shot dead by the police in that encounter and accused Bashir, who is appellant before us, was caught on the spot. Ha was arrested vide arrest memo Ex. P 25 on 18-1-1985 itself. When he was arrested he was found having 12 bore SBBL gun and 4 live cartridges were found in his possession. They were seized and sealed. The accused was lodged in judicial custody on 19 1-1985. His test identification parade was conducted on 20 1-1985 by PW 12 Suresh Chand Gupta, the then Munsif and Judicial Magistrate, Deeg in sub-jail. PW 1 Chander

PW 2 Roshan, PW 9 Pyare, PW 10 Omwati and PW 11 Munshi who had seen the commission of dacoity or were victims of it, participated in the test identification parade and except Chander remaining 4 correctly identified appellant Bashir as one of the miscreants who had committed dacoity in their houses. In consequence of the information furnished by the accused on 31st January 1985 while under police custody, two ornaments, viz , gold Dholna (Article-1) and silver Hansali (Article-2) were recovered from his house at his instance. The information recorded is Ex. P/28 and the recovery memo of the ornaments is Ex. P/12. Both these articles were correctly identified in the test identification parade conducted on 21-3-1985 by the same Judicial Magistrate Shri Suresh Chand. The identification memo is Ex. P/17. On the completion of investigation, the police submitted a crime report against accused Bashir in the court of Munsif and Judicial Magistrate, Kama, who in his turn, committed the case for trial to the court of Sessions. The learned Sessions Judge framed charges under Sections 396 and 397 IPC against the accused to which he pleaded not guilty and faced trial. He refuted the charges and stated that his village Papada is only less than a mile away from village Dabda. He was known very well to the prosecution witnesses who had participated in his test identification parade. Since they already knew him before the incident, his test identification was merely a farce. The omission of his name in the FIR shows that he has been falsely implicated in this incident of dacoity. In support of its case, the prosecution examined 13 witnesses and filed some documents. In defence the accused examined 3 witnesses including himself. On the conclusion of trial, the learned Sessions Judge found no merit or substance in the defence of the accused. He accepted the evidence of the prosecution witnesses and held the charges duly proved against the accused. The accused was consequently convicted and sentenced as mentioned at the very out set. Aggrieved against his conviction the accused has taken this appeal.

4. Before proceeding further it may be pointed out that the learned Counsel for the accused did not challenge the commission of dacoity killing of Smt. Angoori and Shri Phusi in that dacoity and some of the inmates of the house getting injured. Learned Counsel also did not challenge the opinion of Dr. Laxmansingh relating to the cause of death of two victims and the number and nature of injuries found on the inmates of the house. We, therefore, need not discuss the evidence in length

relating to these items. Suffice it to say that a dacoity was committed at about 3 or 3.30 a.m. on 28 10-1984 in the house of Roshan and Pyare. During the commission of that dacoity Smt. Angoori and Shri Phusi were shot dead by the dacoits and some other persons got injured. The dacoits decamped with clothes, cash silver and gold ornaments of huge valuation. The dacoity was thus a real one.

5. In challenging conviction of the appellant, it was strenuously contended by Mr. Birisingh, learned Counsel for the appellant that the identification parade conducted in the instant case was a farce. The accused was already known to the prosecution witnesses who had participated in the identification parade. As such no value can be attached to the evidence of identification. Since the victims already knew the appellant before hand and they had disclosed his name to the Magistrate conducting test identification parade, the omission of his name in the First Information Report or in the statements recorded during investigation makes the entire prosecution case highly suspicious against him. This omission unerringly points out his false implication. The house from which the Articles Ex. 1 and Ex. 2 were recovered, was not in his exclusive possession. As such he cannot be held responsible for the recovery of the ornaments even if it is taken as proved.

6. It was on the other hand, contended by the learned Public Prosecutor that the witnesses who had identified the appellant in the test identification parade as well as during trial in the court had no enmity with him. It was, therefore, difficult to imagine that they would falsely implicate him.

7. We have taken the respective submissions into consideration. In the cases of dacoity, the evidence generally available is of three categories, viz.

[1] the culprits are caught red handed on the spot but this is rare because the culprits go fully armed and well prepared where as the victims are fear stricken and are more interested in saving their skin rather than in combating the miscreants;

[2] identification of the culprits when they are later arrested during the investigation; and

[3] discovery of the incriminating facts such as looted property, weapons used in the commission of the offence and like such other objects.

Here in the instant case, the incriminating evidence is of 2 and 3 categories. The evidence of identification of culprits plays a very significant role and if found trustworthy, is sufficient to seek their conviction, but before the identification is made the foundation of conviction, it should be fair and free from all taints. The facts of identification whether of person or property are relevant and admissible in evidence under Section 9 of the Evidence Act. The substantive evidence regarding identification is that which is given by the witness in the court during trial. But it is a trite law that a mere identification of a culprit in court has little or no evidentiary value in absence of prior test identification parade.

8. The test identification, therefore, plays a very vital role and affords the valuable corroboration to the witness who identifies the culprit later on during trial in the court.

9. Now, whether a witness is able to identify the miscreant who is alleged to have taken part in the dacoity depends on many features such as his eye sight, the state of the light prevailing at the place when the dacoity is committed, the extent of opportunity available to the witness for seeing the offender, the role played by the offender in the commission of the dacoity, the prominent or distinguishing features, if the offender has any and like matters.

10. In the instant case, the dacoity was committed in the night. According to PW 2 Roshan, PW 9 Pyare, PW 10 Omwati and PW 11 Munshi it was pitch dark when the dacoity was committed. In order to overcome this difficulty relating to the insufficiency of the light prevailing at the time of commission of offence of dacoity, an attempt was made to show that the dacoits were having electric torches with them and they flashed it while committing dacoity. The prosecution witnesses have further stated that when the culprits flashed the torches, in that light they identified the appellant.

11. It is common experience of all of us that if a dacoit flashes his into the face of a witness, the later (witness) will get dazzled and will not be able to see the face of

the dacoits or culprit who flashes his torch into his face.

12. The prosecution witnesses Roshan (PW 2), Pyare (PW 9), Omwati (PW 10) and Munshi (PW 11) have claimed that they had seen the appellant when the dacoity was being committed. They did not assign any particular or specific role to the appellant. They have also not disclosed in their police statements recorded during investigation and also in their statements, which they made before the Magistrate conducting the test identification parade in the crime, that the appellant had any prominent distinguishing feature which enabled them to identify him or carry any impression about him. The failure of the prosecution witnesses in not disclosing or mentioning features of the appellant or any other culprit in their statements, has a telling effect and cannot be lightly ignored. The omission to disclose the identity of the appellant in the First Information Report or in the statements recorded during investigation or made before the Magistrate raises a reasonable doubt about his complicity in the crime.

13. There is yet another important aspect of the matter. The dacoity was committed in village Dabda and the appellant is the resident of village Papada. According to the prosecution witnesses, both these villages are situate in close vicinity, the distance between them being hardly of one mile. The appellant had been agitating from very beginning that he is known to the prosecution witnesses and as such the test identification parade is a farce. The contention raised on behalf of the appellant is not ineffective. There is a high degree of probability that when the distance between the two villages i.e. of the appellant and the complainant is hardly of one mile, the prosecution witnesses knew the appellant before hand. In fact there is material on record to strongly suggest that the prosecution witnesses knew the appellant before hand. A memo Ex.P/2 of the test identification was prepared by PW 12 Shri Gupta, Judicial Magistrate, who conducted the test identification parade. In Column 7 of this Ex. P/2, the Magistrate has recorded what was stated to him by the witnesses before they participated in the test identification parade. PW 1 Chander, PW 2 Roshan, PW 9 Pyare, PW 10 Omwati and PW 11 Munshi participated in the test identification parade. Column 7 of Ex. P/2 shows that all of them except PW 10 Omwati, stated before the Magistrate that they had come to identify Bashir (appellant) PW 12 Shri

Gupta has stated that what he had mentioned in Col. 7 of Ex. P2 was deposed before him by these witnesses, The disclosure of the name of appellant Bashir by these witnesses before the Magistrate strongly suggests that they did know him before hand. If they did not know him before hand, they would not have disclosed his name before the Magistrate when they participated in the test identification parade.

14. Closely connected is the matter relating to the omission of the name of the appellant Bashir in the First Information Report, Ex.P I lodged by PW 1 Chander. If Chander PW 1 and the other persons who have come forward to depose against the appellant knew him before hand both by name and otherwise, his name must have been disclosed in the FIR Ex. P/1 in all probability. The omission of his name in the FIR, Ex. P/1 again showed considerable doubt on the veracity and reliability of the prosecution witnesses who have later on come forward to identify him as one of the culprits who had committed dacoity.

15. Recently, in *Harinath and Ors. v. State of UP* 1987 (3) Crimes 667 it was observed by their Lordships in para 9 of the judgment:

The one area of criminal evidence susceptible of miscarriage of criminal justice is the error in the identification of the criminal. Indeed Prof. Borchard's 'convicting the Innocent' records several criminal convictions in which the accused was subsequently proved innocent. The major source of the error is to be found in the identification of the accused by the victim of the crime.

16. In *Bali Ahir v. State of Bihar* : 1983 CriLJ434 it was observed that where the accused is known to the witness from before and yet his name is not mentioned in the FIR this omission has a telling effect. The same is the situation here in the instant case.

17. In *Manzoor and Ors. v. State of UP*. 1982 Cr. LR (SC) 134 their Lordships observed that if at the earliest opportunity the prosecution witnesses do not mention any identifying features of the culprits when they were examined by the Investigating Officer, it is difficult to put reliance on what they stated during trial about identifying the culprits.

18. The prosecution witnesses have also not assigned any particular or specific role to the appellant in the commission of the dacoity. They have merely stated that he was present along with the culprits. It has not been stated by them that they had any weapon with him or that he participated in looting the property in any manner. It is, therefore, difficult to accept what they testified that they had identified the appellant as one of the culprits. In fact they stated nothing to show that they had an opportunity of marking the presence of the appellant during commission of the dacoity.

19. For the reasons stated above, we are unable to put any reliance on the evidence relating to the identification of the appellant that he was one of the culprits, who had committed the dacoity in that night.

20. The appellant was arrested on 18-1-1985. His arrest memo is Ex. P/25. On 31-1-1985 he gave information recorded in Ex. P/28 by the Investigating Officer PW 13 Om Prakash to the effect that he had sealed the silver Hansali and the gold Jantar in his house, which he was willing to get recovered. PW 13 Om Prakash stated that in consequence of this information the appellant took him and the Motbirs to his house situate in village Papda on the same day and took out from an earthen Kothi gold Jantar (Dhoina) Article 1 and silver Hansali, Article 2. He further stated that he seized and sealed these articles and prepared the seizure memo, Ex. P/12. PW 6 Kishori is a Motbir witness of this recovery. The same facts were deposed by him. The learned Sessions Judge has accepted the testimony of the Investigating Officer and PW 6 Kishori and held that these two ornaments. Article 1 and Article-2 were recovered in consequence of the information furnished by the appellant. We have no good and cogent reasons to disbelieve the evidence of the Investigating Officer and PW 6 Kishori. The market value of the ornaments, Article-1 and Article-2 must be in some hundreds. It is difficult to imagine that the Investigating Officer would plant a false recovery on the appellant by spending such a huge amount from his pocket. These two ornaments have been correctly identified by PW 1 Chander and PW 9 Pyare and PW 10 Omwati as belonging to them. The appellant has not laid his claim over these ornaments. In these circumstances, the finding of the court below appears to be correct that these two articles belong to the complainant party, which were looted by the culprits during

the dacoity and they were recovered from the possession of the appellant.

21. It was vehemently contended by the learned Counsel for the appellant that even if this recovery is taken as proved, it was not sufficient to connect the appellant with the commission of dacoity. The dacoity was alleged to have taken place in the early hours on 28 10-1984 while the recovery was made on 31-1-1985. i.e. to say nearly after 3 months. It was argued that looking to this interval of three months in between the commission of the dacoity and the recovery of the stolen articles, it would not be safe to raise a presumption that the appellant was one of the culprits who had committed dacoity. The contention is not without force.

22. In order to raise a presumption under Illustration-A of Section 114 of the Evidence Act that a person found in possession of the stolen goods is a thief, his possession just be recent one i.e. he must be found in possession of the stolen goods soon after the commission of the offence. Here there is a gap of three months and as such the possession of the appellant cannot be said to be recent in time. As such it would not be free from risk to raise a presumption that the appellant was a culprit, who had committed the dacoity. The safer course would be to raise a presumption against the appellant that he was a receiver of the stolen goods.

23. It was contended by the learned Public prosecutor that even if a presumption for a graver offence of dacoity is not raised against the appellant on account of lapse of three months in between the commission of the dacoity and the recovery of the stolen property, a presumption should at least be drawn under Section 412 of the Penal Code. The contention of Mr. Biri Singh learned Counsel for the appellant is that only a presumption for an offence under Section 411 IPC should be drawn. It was argued that in order to draw a presumption for the offence under Section 412 IPC, the prosecution must show that the accused knew that the stolen goods related to the dacoity. No such material is there on record in the instant case. The contention of Mr. Biri Singh has much substance. In order to draw a presumption for offence under Section 412, I PC, the prosecution must adduce material, direct or circumstantial, to show that the accused knew or had reasons to believe that the stolen property received by him relates to the commission of the

dacoity No such material is there to draw a presumption for an offence under Section 412 IPC in the instant case.

24. In *Bhurgiri and Anr. v. The State* ILR (1954) 4 Raj 476, a Division Bench of this court held as under:

Although a person who is found in possession of stolen goods can be convicted under Section 411 IPC, by virtue of presumption under Section 114, Evidence Act, prosecution has to show something more than mere possession of stolen goods for a conviction under Section 412 IPC, as this section requires that the property had been transferred by the commission of a dacoity.

The decision rendered in the above case was approved by their Lordships of the Supreme Court in *Shivnath Singh v. State of UP* : 1970 CriLJ601 .

25. We have already discussed above that there is no evidence or material, direct or circumstantial to show that the accused knew or had reasons to believe that the ornaments, Article-1 and Article-2 were stolen in the dacoity. We are, therefore, unable to convict the accused under Section 412 IPC. The offence made out against the appellant is that under Section 411 IPC.

26. In the result the appeal of accused Bashir is partly allowed. His conviction and sentence under Sections 395 and 396 IPC are set aside and he is acquitted of the aforesaid offences. Instead he is convicted under Section 411 IPC and is sentenced to 3 years rigorous imprisonment. The appellant was arrested on 18-1-1985 and since then he is in custody. He has thus served out the full term of his sentence. He will be, therefore, at once set forth on liberty, if not wanted in any other case.

27. The appeal shall stand disposed of accordingly.