

Shahul Hameed and Another Vs. the State

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SooperKanoon Citation : sooperkanoon.com/788117

Court : Chennai

Decided On : Feb-06-1997

Reported in : 1998CriLJ885

Judge : R. Balasubramanian, J.

Appeal No. : Criminal Revn. Case No. 260 of 1989 and Cri. Revn. Petn. No. 258 of 1989

Appellant : Shahul Hameed and Another

Respondent : The State

Advocate for Def. : Babumuthu Meeran, Public Prosecutor

Advocate for Pet/Ap. : N.A. Ravindran, Adv.

Judgement :

ORDER

1. The revision petitioners are accused 2 and 5 in SC No. 77 of 1986 on the file of the III Assistant Sessions Judge, Coimbatore and appellants 2 and 5 in C.A. No. 268 of 1986 on the file of the I Additional Sessions Judge, Coimbatore.

2. In the trial Court totally ten persons were tried for the offence under Sections 395, IPC. The learned trial Judge found all the ten guilty for the said offence and sentenced each one of them to undergo rigorous imprisonment for seven years.

All the ten accused questioning the judgment of the trial court filed an appeal as stated earlier. Pending appeal, it is reported that the 4th appellant/4th accused died, and therefore the appellate court was called upon to decide the correctness of the judgment of the trial court with reference to only nine accused. The appellate judge on going through the entire evidence found that the prosecution had proved its case for the offence under Section 395, IPC only against A2, A4 (since dead) and A5 and confirmed the sentence of imprisonment is imposed on them by the trial Court. By the said judgment the appellate judge found that the other accused viz., A1, A3 and A6 to A10 are not guilty of the said offence and acquitted them. Aggrieved by the judgment of the appellate Court, accused 2 and 5 have filed this revision.

3. A few facts may be necessary to be set on for a proper appreciation of the issue involved in this case. P.W.1 is the Driver of lorry bearing No. MDR 4183. P.W.2 is the cleaner of the said lorry. It is the evidence of PW.1 and 2 that on 15-11-1985 when they were proceeding to Ernakulam from Madurai in the said lorry to transport oil, the vehicle was intercepted immediately after midnight on 15-11-1985 i.e., in the early hours of 16-11-1985 in a road near Jameen Uthukuli in Pollachi. They noticed ten people standing on the road and according to PWs. 1 and 2 one among the 10 pushed a cycle (marked as M.O.1 in this case) in front of the lorry which made P.W.1 to stop the lorry abruptly. Thereafter, according to PWs.1 and 2 one among the 10 entered into the lorry and pushing P.W.1 to the side, drove the lorry to the side of the road and parked it. Then he relieved P.W.1 of M.O.s 2 - watch and some currency. While doing the above mentioned acts some injuries were caused to P.W.1. Besides the above two accused the third person among the ten is stated to have assaulted PW. 2. PWs. 1 and 2 claim that after committing the offence as referred to above the accused fled the scene. PWs.1 and 2, who are the victims of the crime above referred to state that after the offence was perpetrated on them, they happened to meet a lorry coming in the opposite direction. PW. 4 is the cleaner of the said lorry. It is in evidence that PWs. 1 and 2 stopped the on coming lorry and told them about what had happened a little earlier. On the advice of the driver of the lorry, who is not examined in this case; PWs. 1 and 2 proceeded to the police station. Since they did not know the place where the police station is situated, PW. 1 enquired a taxi driver and he

guided them to the police station. Enroute PWs. 1 and 2 are stated to have met two constables to whom also the witnesses disclosed the offence. On hearing the same the constables advised them to go to the police station and lodge the complaint. PW. 1 claims to have spoken to his employer over phone and there after the complaint came to be lodged at about 7.00 a.m. on 16-11-1985 in the police station, of which PW. 10 is the Sub-Inspector of Police. PW. 10 commenced the investigation.

4. It is on record that PW. 1 identified all the accused except A1 and A3 on 28-11-1985 at Jameen Uthukuli, when he was in the company of PWs 10 and 12. On such identification of the accused by PW 1 they were arrested. It is the case by the prosecution that at the time of arrest of the accused as stated above, they gave voluntary statements which lead to the recovery of M.O. 1 cycle from A9, M.O. 2 watch from A2 and M.O. 3 money-purse from A5. The money-purse is stated to contain at that time a sum of Rs. 263/- together with a slip containing the address of PW. 1 and a photograph of film actor Sivaji Ganesan. The investigating agency after complying with all the formalities of investigation laid the charge sheet before the trial court as stated above against 10 named accused alone for an offence under Section 395, IPC. As already referred to, the trial court convicted all the ten for the offence under Section 395, IPC and on appeal the conviction was confirmed only with reference to A2, A4 and A5 (A4 died pending appeal) and the other accused were acquitted.

5. I heard Mr. N. A. Ravindran, learned counsel appearing for the revision petitioners and Mr. G. Babu Muthumeeran, Public Prosecutor (Criminal side) for State. On the above proved facts the learned counsel for the revision petitioner contended that the conviction of the revision petitioners under Section 395, IPC cannot be sustained for more than one reason and the grounds put forward by him are enumerated hereunder :-

a) Though the accused were stated to have been arrested on 28-11-1985, the test identification parade was held only on 20-1-1996. Therefore the delay in conducting the test identification parade would raise a very serious doubt in the identification itself and under these circumstance no credence whatsoever could

be attached to the said proceeding and the evidence of PWs. 1 and 2.

b) Even in the identification parade PW. 1 identified only the 4th accused and PW. 2 identified only the 5th accused and therefore in the face of the long delay of 54 days in holding the identification parade, the evidence of the witnesses cannot be safely accepted. The fact that only two accused came to be identified would show that the evidence of PWs. 1 and 2 has no evidentiary value at all.

c) The appellate court having acquitted seven accused and having found guilty only two accused besides the deceased accused, the conviction under Section 395, IPC cannot be sustained, because for an offence under Section 395, IPC a minimum number of five persons must participate in the occurrence.

d) PWs. 5, 6, 8 and 9, the witnesses for recovery, having turned hostile, the recovery itself have to be doubted. (sic) elaborated this point saying that when the evidence of PWs. 1 and 2 is itself very suspicious about the identification of the accused then the recovery also should be doubted.

e) Accepting the prosecution case as true, even then the offence under Section 395, IPC has not been made out, because only three people are stated to have acted collectively in committing the crime and the remaining seven were merely present.

6. Per contra Mr. Babu Muthumeeran, Government Advocate on the Criminal Side would contended that the delay in conducting the identification parade would not vitiate the prosecution case and that the recovery in this case had been clearly proved. Even assuming for a moment that the offence under Section 395, IPC is not made out, the accused, from whom MOs. 2 and 3 were recovered, could be convicted for a lesser offence under Section 379, IPC or 411, IPC raising the presumption under Section 114(a) of the Indian Evidence Act.

7. I have carefully considered the arguments of the counsel on both sides and perused the records as well as the judgment. The complaint in this case is lodged by PW. 1. The name of the accused are not given in the complaint and it could not have been given because the victims and accused are totally strangers. The trial

court also found this. In the complaint it is mentioned that ten persons who could be identified had committed the crime. There is no mention in the complaint that PWs. 1 and 2 were able to identify the accused with the head-light of the lorry. But it is stated that with the help of the light that was on in the cabin, they could identify. No specific physical features of any of the accused are mentioned in Ex.P. 1. Likewise, PW. 1 had not also mentioned the denominations of the currencies available with him. There is no mention about PW. 1 keeping the money in his money-purse and the purse containing his address slip as well as the photograph of film actor Sivaji Ganesan. The description of the watch is also not given. Therefore, it is clear that the complaint is totally bereft of the essential features with which the accused and the property could be identified. PW. 1 claims to have identified on a single day i.e. on 28-11-1985 all the accused except A. 1 and A. 3 and yet he was unable to identify the accused except A. 4 in the test identification parade held on 20-1-1986. In his evidence in chief he would state that M.O. 2 was recovered from Babu. To a question put by court, when he was examined, he would identify Babu as A. 2 present in the Court hall. It is not in the evidence of PW. 1 or in the evidence of PWs. 10 and 12 that A. 2's alias name is Babu. PW. 2 was able to identify only A. 5. The evidence of PWs. 1 and 2 further discloses that though ten persons were stated to be present when the lorry was intercepted on the night of 15-11-1985 yet only three played an active role in committing the offence. These facts mentioned above and as found reflected in the evidence of the witnesses are undisputed facts. In the face of these undisputed facts, the question that falls for consideration is whether the conviction of the revision petitioners alone for an offence under Section 395, IPC could be sustained or not;

7A. Dacoity is defined under Section 395 of the Indian Penal Code, which starts saying when five or more persons conjointly commit or attempt to commit a robbery, then the offence of dacoity is said to be committed. The emphasis in this section is on five or more persons conjointly committing an offence. In other words five or more persons must collectively and actively participate in committing the offence of Dacoity. In this case, the evidence discloses, that though ten persons were stated to be present on the road side, only three played a role in the commission of the offence and the other seven, according to the evidence available in this case, have not done anything in the

commission of the offence. Therefore even on this ground it is clear that the prosecution had failed to make out a case of dacoity.

8. The next contention put forward by the learned counsel appearing for the revision petitioners about the delay in conducting the test identification parade has also force. Admittedly the arrest was on 28-11-1985 and the test identification parade was conducted only on 20-1-1986. Under these circumstances, the learned counsel, appearing for the revision petitioners states that the test identification parade having been conducted after a lapse of such a long time, it is difficult to accept that the witnesses would be remembering the facial expressions of the accused, and in my view it is well founded. It is because in the complaint lodged by PW 1 no specific physical features of any of the accused are mentioned. Even in Court neither PW. 1 or PW. 2 gave evidence about any specific act or part played by any of the accused present in the Court in the commission of the offence. Therefore, in the back ground of lack of details in Ex. P. 1 about the personal identification marks of the accused or of the property, and their failure to give evidence about the actual role played by any of the accused, it is not possible to safely rely upon the test identification parade conducted after a delay of 54 days in this case. The learned counsel for the revision petitioners in this case cited a ruling of the Supreme Court reported in *Soni v. State of Uttar Pradesh* 1983 SCC (Cri) 49 (1). In this case the Supreme Court doubted the genuineness of the evidence of the witnesses on account of the delay in holding the test identification parade. To the same effect is another judgment of the Supreme Court relied upon by the learned counsel appearing for the revision petitioners and reported in *Wakil Sing v. State of Bihar*, : 1981 CriLJ1014 . In this case the Supreme Court held as follows (para 2) :-

'In the instant case we may mention that none of the witnesses in their earlier statements or in oral evidence gave any description of the dacoits whom they have alleged to have identified in the dacoity, nor did the witnesses give any identification marks viz., stature of the accused or whether they were fat or thin or of a fair colour or of black colour. In the absence of any such description, it will be impossible for us to convict any accused on the basis of a single identification, in which case the reasonable possibility of mistake in identification cannot be

excluded. For these reasons, therefore, the trial court was right in not relying on the evidence of witnesses and not convicting the accused who are identified by only one witness, apart from the reasons that were given by the trial Court. The High Court however has chosen to rely on the evidence of a single witness, completely over mentioned above. The High Court also ignored the fact that the identification was made at the T.I. parade about 3/2 months after the dacoity and in view of such a long lapse of time it is not possible for any human being to remember, the features of the accused and he is, therefore, very likely to commit mistakes. In these circumstances unless the evidence is absolutely clear, it would be unsafe to convict an accused for such a serious offence on the testimony of a single witness.'

Both these judgments relied upon by the learned counsel for the revision petitioners applies on all force to the facts of the present case. Therefore I am of the opinion that the evidence of the prosecution witnesses in identifying the accused No. 4 and 5, in the test identification parade is not free from doubt and it will be very unsafe to rely upon the same to convict the accused in cases of such grave offence.

9. The learned counsel's argument that in view of the fact that the conviction had been confined only to two accused and since for an offence under Section 395, IPC participation of more than five persons is essential, the impugned judgment is unsustainable is also well founded. I went through the charge framed in this case. The charge is very specific that the 10 named accused before the trial court had committed the offence of dacoity and the 10 named accused alone were put up for trial. The charge as framed does not refer to any other person besides the ten accused to have been concerned with the occurrence. In view of this admitted position regarding the framing of the charge, if the argument of the learned counsel is scrutinised, then it has to be held that even on that ground the conviction under Section 395, IPC has to be set aside. The learned counsel relied upon two judgments in this context viz., *Ramshankar v. State of U.P.*, : 1956 CriLJ822 and *State of Gujarat v. V. A. Chauhan* (1983) 1 Cri 734 :1983 CLJ 691 (1). In the first case six accused, were put in for trial for the offence of dacoity, The trial Court convicted all the six for the said offence. On appeal the High Court gave

the benefit of doubt to three accused and confirmed the conviction only with reference to three out of six accused. When the matter went up to the Supreme Court of India, the Court held that the conviction under Section 395, IPC cannot be maintained only with reference to three alone. In that case the Supreme Court had taken note of the fact that the charge as framed did not refer to any other person besides the six accused to have concerned with the occurrence. In the later case also the Supreme Court took the same view and set aside the conviction under Section 395, IPC. : AIR 1973 SC760 relied upon by the Public prosecutor to sustain the conviction in respect of accused alone is of no use to him. In that case the charge sheet was that the named eight persons along with six others had participated in the commission of the crime. This judgment also took note of the earlier decision of that Court reported in : 1956 CriLJ822 . On the facts of that case i.e., : AIR 1973 SC760 , when the charge was to the effect that eight named persons along with six others took part in the crime, the Supreme Court took the view that the conviction of the three alone was in order. In view of the charge as framed in the case on hand, I am of the view that the judgment reported in : AIR 1973 SC760 would not be applicable to the present case as it is distinguishable on facts and the law laid down in : 1956 CriLJ822 alone would apply to the facts of this case. Even on this ground the conviction under Section 395 IPC must fail.

10. The counsel for the State submitted that assuming it is not possible to sustain the conviction under Section 395 IPC yet on the evidence available, it is possible to convict the accused for an offence under Section 379 or 411 IPC since recovery is proved from A2 and A5. As far as A2 is concerned PW 1 in his evidence categorically states that M.O. 2 was recovered from one Babu. There is no evidence before Court to show that A2 is also called as Babu. A2's name is Shakul Ameer. Therefore in the absence of such evidence though PW 1 was able to point out in Court, when his evidence was recorded, that Babu is A 2 present in the Court hall, it would be very unsafe to accept his evidence, to connect the recovery of M.O. 2 with A. 2. Further the specific description of M.O. 2 is not given in the complaint. PW 1 in his evidence also had not given any details about the watch stated to have been stolen from him except stating that M.O. 2 belongs to him. Therefore, I find the argument of the learned counsel for the revision petitioners that the recovery of M.O. 2 from A. 2 is not free from doubt, commends

acceptance. The recovery of M.O. 3 from A. 5 is also not free from doubt. In the complaint there is no mention that PW 1 had kept the money in his money-purse and the money-purse contained his address slip and the photograph of film star Sivaji Ganesan. Even in evidence in court PW. 1 did not say that his money-purse contained his address slip and the photograph of film actor Sivaji Ganesan. The denomination of the currencies said to have been kept in the purse is also not mentioned at the earliest point of time. Under these circumstances the recovery of M.O. 3 from A. 5 is also not free from doubt.

11. Therefore for all the reasons stated by me earlier, the conviction under Section 395 IPC cannot be sustained and the accused cannot be convicted even for the lesser offence as pleaded by the Prosecutor. In the result the revision is allowed. The conviction and sentence of imprisonment for the offence under Section 395 IPC on the revision petitioners imposed on them by judgment dated 4-11-1986 in S.O.No. 77 of 1986 on the file of the III Assistant Sessions Judge, Coimbatore and confirmed in judgment dated 13-4-1989 in C.A.No. 268 of 1986 on the file of the I Additional Sessions Judge, Coimbatore is set aside. The accused are hereby acquitted.

12. Revision allowed.