

Bharat Singh

Vs

State of U. P.

Criminal Appeal No. 242 Of 1959

(CJI J. M. Shelat, Y. V. Chandrachud, S. N. Dwivedi JJ)

15.09.1972

JUDGMENT

CHANDRACHUD, J. -

1. The appellant Bharat Singh, along with two others, was convicted by the learned II Temporary Additional Sessions Judge, Bijnor, under Section 395 of the Indian Penal Code and was sentenced to rigorous imprisonment for 8 years. The order of conviction was confirmed in appeal by the High Court of Allahabad, but it reduced the sentence to 6 years. This appeal by special leave is directed against the judgment of the High Court.

2. A U.P. Government Roadways Bus was proceeding from Delhi to Bijnor on April 15, 1964. After the bus left Dharnaaura, a passenger seated in the upper class pointed a pistol at the driver Bhajan Lal and asked him to stop the bus. Another passenger in the upper class was carrying a hockey stick while three others in the lower class armed with pistols. The five miscreants then robbed the passengers and ran away. The bus resumed its journey and on reaching Chandpur, the conductor, Ishar Ali, lodged the first information report at the Police Station.

3. The appellant was arrested on May 3, 1964. At the trial, he denied having participated in the dacoity and alleged that he was implicated falsely. He contended particularly, that he was shown to the several witnesses before the identification parade was held.

4. Many witnesses were examined by the prosecution but, for the purposes of this appeal, the evidence of two witnesses only is primarily important. Those witnesses are Rahman Shah and Krishna Kumar Mittal, who claim to have travelled by the particular bus According to Rahman Shah, the appellant was sitting behind the driver's seat and was carrying a weapon like a hockey stick. The appellant and his companions are alleged to have robbed the passengers, Rahman Shah himself having been robbed of a sum of Rs. 30/-, a cap and a glass. Krishna Kumar says that the five miscreants first robbed the Muslims, then the Hindus and that the incident occupied about half an hour. Both the witnesses identified the appellant in the identification parade held on August 7, 1964.

5. Learned counsel appearing on behalf of the appellant raised many contentions of fact which we do not propose to entertain. His main attack is, however, directed against the manner in which the identification parade was held and we will deal with that point briefly. The contention is that the rules framed by the High Court of Allahabad in regard to identification parades were not observed by the Magistrate who held the parade. Counsel says that a large number of chits were placed on the face of the appellant in order to cover the marks of identification and such extensive covering of the face would render identification impossible. We are unable to accept this contention because Dr. R.

S. Asthana, a Magistrate of the First Class who held identification parade was not cross-examined at all in regard to the manner in which the parade was held or in regard to the number of chits which were placed on the face of the appellant. The evidence of the Magistrate not having been challenged in the Sessions Court, we cannot permit counsel to raise the contention that the parade was held in an irregular manner, contrary to the rules framed by the Allahabad High Court. The decision of this Court in *Budhsen v. State of U.P.*, ([1970] 2 SCC 128 : 1970 SCC (Cr) 343 : (1971) 1 SCR 564) in which it was observed that Magistrates who are in charge of identification parades must take due precautions in order to eliminate suspicion of unfairness and to reduce the chances of testimonial error has, for the same reason, no application.

6. In *Hasib v. State of Bihar*, (AIR 1972 SC 283 : 1972 Cr LJ 233) it was observed by the Court that identification parades belong to the investigation stage and therefore it is desirable to hold them at the earliest opportunity. An early opportunity to identify tends to minimise the chances of the memory of the identifying witnesses fading away due to long lapse of time. Relying on this decision, counsel for the appellant contends that no support can be derived from what transpired at the parade as it was held long after the arrest of the appellant. Now it is true that in the instant case there was a delay of about three months in holding the identification parade but here again, no questions were asked of the investigating officer as to why and how the delay occurred. It is true that the burden of establishing the guilt is on the prosecution but that theory cannot be carried so far as to hold that the prosecution must lead evidence to rebut all possible defences. If the contention was that the identification parade was held in an irregular manner or that there was an undue delay in holding it, the Magistrate who held the parade and the Police Officer who conducted the investigation should have been cross-examined in that behalf.

7. It is then said that there are serious contradictions in the evidence of the prosecution witnesses which have not been considered by the High Court but this argument also does not impress us. For example, whereas Rahman Shah says that the appellant was carrying a weapon like a hockey stick another witness called Safiq says that the assessment year was armed with a pistol. It is common experience that in the confusion of the moment witnesses are prone to make such errors especially if seized by sudden fear. Besides, those who are determined to be lawless do not always stick to their weapons.

8. It is contended that the name of Krishna Kumar who claims to have been looted and who is one of the two identifying witnesses is not mentioned in the First Information Report, and therefore it is at least doubtful whether he was travelling by the particular bus. Now, it must be remembered that about twenty persons were travelling by the bus and though almost all of them were looted, the First Information Report contains the names of some of them only. The fact therefore that Krishna Kumar's name is not included in the First Information Report cannot justify the inference that he was not travelling by the bus. Counsel says that whether Krishna Kumar got into the bus at a particular stage could have been verified by reference to the way-bill and another document showing the number of persons travelling by the bus and the various stages at which they got into the bus but these documents were suppressed by the prosecution and therefore an adverse inference must be raised against it. We cannot agree. Krishna Kumar's evidence has been accepted both by the Sessions Court and the High Court and we do not see sufficient reason for taking a contrary view of that evidence.

9. It was finally urged that in fact not Krishna Kumar but another witness called Krishna Chand Thepan had identified the appellant. In support of this submission counsel produced before us an uncertified copy of the Memo of Identification and he asked that we should call for the original

record from the High Court in order to satisfy ourselves that the submission is well-founded. There is substance in this contention. Such a contention was not raised on behalf of the appellant either in the Sessions Court or in the High Court. In fact, neither the memorandum of appeal presented to the High Court nor in the petition for special leave presented to this court is any suggestion made that Krishna Chand and not Krishna Kumar had identified the appellant. The course of the proceedings shows that it was common ground that it was Krishna Kumar who had purported to identify the appellant in the identification parade. That identification was challenged on other grounds but not on the ground that Krishna Chand and not Krishna Kumar had in fact identified the appellant.

10. In the result we confirm the order of conviction and sentence passed by the High Court and dismiss the appeal.

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