

Bali Ahir and Others

Vs

State of Bihar

Criminal Appeal No. 257 Of 1975

(D.A. Desai, R.B. Misra JJ)

18.01.1983

JUDGMENT

R. B. MISRA, J. –

1. The present appeal by special leave is directed against the judgment of the High Court of Patna dated November 8, 1974 whereby the appeal of the appellants was allowed in part and their conviction under Section 395, IPC was set aside, and the appellants were convicted under Section 394, IPC and sentenced to rigorous imprisonment for four years.

2. The appellants along with three others were committed to the Court of Session to stand their trial for an alleged offence under Section 395, IPC, in connection with a robbery committed in the house of Harihar Prasad Singh, PW 2. At the relevant time Harihar Prasad Singh was posted as an Assistant Sub-Inspector of Police at Udwananagar Police Station in the district of Arrah. He had his residential quarters in the compound of the Police Station, Udwananagar. On the night of May 2 and 3, 1968 he was sleeping in the outer room of his quarters. His wife and younger son, Ashok Kumar were sleeping on a chauki in the courtyard. At about 2 a.m. in the night Harihar Prasad Singh woke up on hearing an alarm raised by his wife of 'thief-thief'. He went inside the courtyard and found a person opening the door. He caught hold of him by the waist. In the meantime five to seven persons entered the courtyard and began to assault him with lathis. One of them hit him with a lathi on his forehead. Other persons also assaulted him. On receiving injuries he fell down. In the meantime his wife and son went to the southern room, in which his younger brother's wife (Bhawah) was sleeping, to conceal themselves and tried to close the door leaves but they could not succeed because three of the miscreants broke into the room by pushing it. Then they came out of the room and began to raise alarm. The dacoits took out four boxes from that room. One box contained utensils etc. and other contained woollen and cotton clothes. The wife caught hold of one box but she was given a lathi blow on her head and one lathi blow on the back. The dacoits thereafter decamped taking two of the boxes. In response to the alarm, the officers of the police station viz., Sub-Inspector Ganesh Singh, Assistant Sub-Inspector Khaderan Singh and three constables Ganga Singh, Moinuddin Khan and Ram Bahadur arrived at the place of occurrence and they chased the dacoits for some distance but in vain. Sub-Inspector Ganesh Singh came back after chase and recorded the statement of Harihar Prasad Singh (Ex. 2).

3. Harihar Prasad Singh was taken to the hospital at Arrah for treatment. The doctor found six injuries on his body including one incised wound 3 1/3 inches x 1/2 inch x bone deep on head. Smt Champa Devi, wife of Harihar Prasad Singh was also examined and the doctor found one lacerated wound 3 inches x 1/2 inch x bone deep, on the head.

4. From the first information report it appears that the dacoits were unknown persons. Therefore, two identification parades were held, one on May 8, 1968 by Shri Yogendra Nath Jha, PW 7, and the other on May 24, 1968 by Shri S. M. Mukherjee, PW 6. In the first identification parade constable Moinuddin Khan, PW 3, identified Ramadhar Ahir, appellant 3. In the second identification parade Harihar Prasad Singh, PW 2, identified Bali Ahir and Chain Ahir, appellants 1 and 2 respectively. Khaderan Prasad Singh, PW 4, identified Bali Ahir, Chain Ahir and Ramadhar Ahir, appellants 1, 2 and 3 respectively as the persons who were seen running away from the place of occurrence. Moinuddin Khan, PW 3, identified Bali Ahir and Chain Ahir, appellants 1 and 2. Prosecution witnesses 2, 3 and 4 identified the appellants in court also.

5. The trial court relying on the evidence of identification by the aforesaid witnesses convicted the appellants under Section 395, IPC and sentenced them to rigorous imprisonment for eight years. It, however, gave benefit of doubt to the remaining three accused and acquitted them.

6. On appeal by the appellants the High Court set aside the conviction and sentence of the appellants under Section 395, IPC and instead convicted them under Section 394, IPC and sentenced them to rigorous imprisonment for four years. The appellants have now come to challenge the judgment of the High Court by filing the present appeal by special leave, as stated earlier.

7. The conviction of the appellants is based upon evidence of identification. It may be pointed out at the very outset that except Harihar Prasad Singh, PW 2, the other witnesses, namely Moinuddin Khan, PW 3, Khaderan Prasad Singh, PW 4, Ganesh Singh, PW 8, and Ganga Singh, PW 9 had seen the accused from behind only when they were running away from the scene of occurrence. They chased the dacoits for some distance but could not succeed in arresting any of them.

8. So far as Harihar Prasad Singh, PW 2, is concerned he appears to have investigated a case against Bali Ahir of village Bajruhatola prior to the occurrence. He clearly admitted so in the cross-examination :

I remember that I had gone to Bajruhatola for investigation prior to the occurrence. I do not remember how many times I had gone. I had gone to Bajruhatola in connection with the case of Bali Ahir. It relates to an affair within a year from the occurrence. Bali Ahir also was an accused in a theft case and I had arrested him at Tetaria. It was I who had sent him up. I had issued a forwarding letter in that connection.

He, therefore, fully knew Bali Ahir of Bajruhatola and there is no question of identification by him when he personally knew Bali Ahir. Bajruhatola is about a mile from the police quarters and Udwantnagar is about half a mile from the police quarters. Bali Ahir is a resident of Bajruhatola, Police Station Udwantnagar. Ramadhar is also a resident of village Bajruhatola, Police Station Udwantnagar. Chain Ahir is a resident of Udwantnagar Tola, Police Station Udwantnagar. So all the three appellants are residents of the vicinity within one or one-half of a mile from the Police quarters and, therefore, the possibility of seeing and knowing them by the witnesses who were either constables or officers of the police station, Udwantnagar, cannot be weeded out.

9. There is yet another circumstance which must be taken into consideration. Ganesh Singh, PW 8, in his cross-examination said that accused Dowarika (since acquitted) and Ramadhar were brought

to Arrah Mofussil Police Station in the course of investigation. He took them under his charge and he had forwarded and sent them up from the said police station. He had forwarded both of them through his staff or through the staff of the mofussil police station. He also admitted that for requisitioning staff from any other place requisition is made in writing; verbal requisition is also made. Nothing is, however, recorded in his diary about the requisition. No staff of mofussil police station had been made a witness. In his diary also there is no mention of such a witness who had taken charge of both the accused from the mofussil police station. Therefore, the possibility of the constable witnesses taking them from the mofussil police station to the Udwantnagar Police Station cannot be overruled.

10. Witnesses other than Harihar Prasad Singh, PW 2, as pointed out earlier, had seen the dacoits only from behind and that too from a distance of more than fifty yards. It is very difficult to recognise persons at night from behind specially when they are running. Even if they turn their faces towards back for a second or so it would be very difficulty in the night to recognise the face within that short gap.

11. Even the identification parade appears to be suspicious, as will be evident from the deposition of Shri Yogendra Nath Jha, Assistant Settlement Officer (Consolidation) who conducted the identification parade on May 8, 1968. He stated that constable Moinuddin Khan at the time of identification of the suspects had twice moved forward and backward seeing them. Shri S. M. Mukherjee, PW 6 in his deposition said that he did not mark if the witnesses were at the jail gate or not at the time when he arrived at the jail. This indicates that all was not well with the identification. The fact that the appellants belong to the neighbouring village at a distance of less than a mile, that the witnesses who came to identify the appellants had seen the accused from behind while escaping, that PW 2, had known Bali Ahir from before yet he did not name him in the first information report and went to identify him when he fully knew Bali Ahir, that the identification of the two of the appellants took place after a gap of four days after their arrest, without explaining the cause for the delay, speaks for itself.

12. For the reasons given above the conviction of the appellants under Section 394, IPC cannot be sustained. The appeal is, therefore, allowed and the conviction and sentence of the appellants under Section 394, IPC are set aside, and they are acquitted of the charge. Bali-bond, if any, shall stand cancelled.

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