

Tahir Mohammad, Kamad Girendra Singh and another

Vs

State of M.P

Criminal Appeals Nos. 55 of 1981

(S. R. Pandian, Kuldip Singh, R. M. Sahai JJ)

12.02.1992

JUDGMENT

1. The above six appellants/ accused took their trial on the allegations that on 26-5-73 at about 11 p.m. near village Ganaur at the road side they all committed dacoity and in the course of the commission of such dacoity caused the death of one Birbal and also looted cash, wrist watches and ornaments etc. and that in the course of transaction they were armed with the guns, pistols and knives. On the above allegations, various charges were framed against the appellants under Ss. 396, 395 and 395 read with S. 397, I. P.C. and under S. 27 the Arms Act. For better understanding-and easy appreciation of the facts of the case, we are making reference to the appellants in the order as arrayed before the trial Court.

2. The brief facts of the case as disclosed from the evidence adduced by the prosecution can be summarised as follows:

On 26-5-73 at about 11 p.m. a passenger bus bearing Registration No. NPA 5282 proceeded from Birshinghpur of Satna District via Gurh and Churhat for Sidhi. P.W. 3, Motilal Gupta and P.W. 8, Sultan Ali were the conductor and driver respectively of the bus. There were about twenty passengers in the bus of whom one was Bibral Ali the deceased herein belonging to village Patauta, to which A 1 to A3 belong. When the bus had hardly covered four miles beyond the Mohania Barrier and was crossing through the hilly terrain of Eymore range within the Revenue village of Ganaur, the driver suddenly found that the road ahead was blocked by boulders. The driver brought the bus to a halt. There were some gun shots from the right side of the bus. Suddenly these 6 accused came up on the road. One of them climbed up on the seat of the driver and pushed him aside at his gun point. The driver suddenly switched off the lights and warned the passengers that the bus was to be looted and the passengers could run for safety. But even before the passengers could alight from the bus, some of the dacoits entered through the driver's window and compelled the driver to put on the lights. The other dacoits took position outside with weapons and prevented the passengers from getting down from the bug. Two accused entered from the side doors armed with fire-arms and started relieving the passengers of their cash, watches and ornaments. It may be mentioned that the dacoits had put stripes (patti) on their faces evidently to conceal their identity. The passengers were stunned and became panicky. In the course of the dacoity, Birbal along with the conductor (P.W. 3) was taken outside the bus and questioned as to whether he recognised the dacoits. He

replied in the negative. Not being satisfied with his reply, one of the dacoits fired at Birbal from a close range and killed him.

3. After looting the passengers of their valuables, the accused made good their escape after deflating the tyres. A little later two trucks came together from Rewa side and cleared the road. By the time P.W. 27, a Medical officer, came on his motorcycle from the opposite direction. P.W. 27 after hearing the incident of dacoity instead of proceeding further took P.W. 1 to the Police Station for reporting the matter at Churhat police station. He woke up the Station House Officer at his residence and dictated the First Information Report Ex. P1 at about 12.30 in the night. In the meantime, the driver P.W. 8 changed the deflated wheel and brought the bus to the police station with passengers leaving the dead body at the spot. The Station House Officer came to the scene spot and found the dead body lying. He held inquest over the dead body and sent the same for post-mortem examination. During the course of the investigation he seized the empty cartridges Ex. P7, prepared a site plan, Ex P12 and examined the witnesses. On 3-6-73 at about 2.15 p.m. the first and the second accused were arrested and interrogated. On the confession given by the second accused Arjun Singh several articles which were the subject-matter of dacoity were recovered. He also seized two country made 12 bore pistols in pursuance of the statement of the first accused. The fifth and the sixth accused were arrested at about 10.30 p.m. on the same day. On the information given by the fifth accused a watch and some ornaments were recovered. At the time of the arrest of the sixth accused, he was wearing a Titun watch which was seized under Ex. P-30. A test identification parade was held by the Deputy Collector (Magistrate Ist Class PW 33) under the directions of the District Magistrate on 18-6-73 within the lock up premises at Sidhi where 34 other under-trial prisoners were mixed up with the suspects. The witnesses identified the accused as follows.: A1 was identified by P.Ws. 1 to 5 and 32, the second accused was identified by P. Ws. 1 to 5, 8, 9 and 13, accused No. 3 was identified by P.Ws. 1-9 and 13. Accused No. 4 was identified by P.Ws. 1-3 and 8, accused No. 5 was identified by P.Ws. 2-5, 8 and 13. Accused No. 6 was identified by P.Ws. 2, 5, 8 and 9. After completing the investigation the charge-sheet has been filed against all the six accused. The trial Court accepting the evidence let in by the prosecution convicted accused Nos. 1, 2, 5 and 6 and sentenced each of them to undergo life imprisonment for the major offence under S. 396, I.P.C. and also convicted and sentenced them for the other offences for various terms of imprisonment with a direction that all the sentences to run concurrently. In addition to above A1 has been convicted under S. 27 of the Arms Act sentenced. to undergo rigorous imprisonment for a period of three years and this sentence was also directed to run concurrently along with other sentences. Accused Nos. 3 and 4 were acquitted.

4. Feeling aggrieved by the judgment of the trial Court the convicted accused preferred appeals before the High Court. The State on being dissatisfied with the order of acquittal of accused Nos. 3 and 4 preferred its appeal challenging the order of acquittal of the two accused persons. The High Court for the reasons assigned in its common judgment dismissed the appeal preferred by the convicted appellants Nos. 1, 2, 5 and 6 also allowed the State appeal preferred as against the acquittal of the third and fourth accused and sentenced them to imprisonment for life.

5. All the learned counsel appearing on behalf of the appellants vehemently contended that the judgment of the High Court not only confirming the convictions of accused Nos. 1, 2, 5 and 6 but also allowing the State appeal cannot be justified since the evidence let in by the prosecution does not satisfactorily make out a case against all the appellants. According to them the evidence is very meagre, insufficient and unsatisfactory. It has been seriously contended that the culprits who committed the dacoity inside the bus and also murdered Birbal after covering their faces with masks might not have been identified by anyone of the inmates of the bus; and all the accused persons

were shown to the witnesses at the police station and also before the accused were taken for the test identification parade.

6. The occurrence took place at about 11 p.m. in a hilly terrain area. As soon as one of the dacoits got into the driver's seat the driver first of all switched off all the lights. Admittedly it was not a moonlit night. Even if it was so, there would not have been sufficient light inside the bus after the lights were switched off. According to the evidence the driver switched on the lights inside the bus on being threatened by the dacoits. Admittedly all the dacoits have covered their faces with stripes of papers. In other words they have covered their faces under cover of devised masks so that their identity could not be noted by any of the passengers in the bus. The shooting of one of the passengers, namely Birbal Ali was not inside the bus but outside the bus, that too on the backside of the bus. It appears that besides these six accused persons, there were also some more persons totalling to 10. The other participants in the dacoity have not been secured by the police. The question that arises for our consideration is whether the inmates of the bus could have identified the features of the dacoits while they were reeling under a terrible shock on account of the sudden attack perpetrated on all the passengers. Admittedly, none of the accused persons have any acquaintance or had seen these accused persons earlier to this occurrence. Therefore, the entire prosecution case has to be accepted or rejected only on the identification of the dacoits and the recovery of the looted articles said to have been recovered pursuant to the statements of the accused. No doubt these witnesses have identified these accused persons in the Court. If we are satisfied with the test identification parade on the basis of which the entire edifice of the prosecution case has been built up then there could not be any difficulty in sustaining the conviction. But on the other hand if the test identification parade creates any doubt in the mind of the Court, then the benefit of doubt has to be given to the accused persons.

7. Keeping in view the purpose of an identification parade, the Magistrate holding it is expected to take all possible precautions to eliminate any suspicion of unfairness and to reduce the chance of testimonial error.

8. In the instant case the witnesses who were the inmates of the bus both in their earlier statements and in their oral evidence before the Court have not given any description of the dacoits whom they have alleged to have identified in the dacoity, nor have they given any identification marks such as the stature, complexion height of the accused. Further under the stress and strain of such a serious incident as the present one it would have not been possible for the witnesses to identify the culprits especially when the culprits were under masks. The suspects were all under fetters at the time when they were taken for the test identification parade and during the parade also. The possibility of identifying all, on seeing the fetters cannot be excluded. P.W. 33 had adopted a verily novel and unusual method of asking the suspects to stand in the test identification parade with fetters on their legs connected with a rod whereas the other under-trial prisoners who were mixed up with the suspects were unfettered. P.W. 33 in his deposition has given the following evidence: "In the course of blankets being held by the fettered accused .the rods fixed with their fetters did not fall in such a way that these could protrude in the front side near their feet. I cannot tell the manner in which the accused were holding their rods. It is also possible that they might be holding blankets in one hand and the rod in the other."

9. The explanation of the Executive Magistrate (PW 33) that all the suspects and the under-trial prisoners mixed up in the parade had not only covered their faces with stripes of papers but also covered their body by blankets is not a palatable and acceptable one. The very fact that all the witnesses even without any margin of error had identified the suspects as culprits, creates a lurking

suspicion in mind of the Court as to whether the identifying witnesses took a clue in identifying the suspects put up in the parade with the fetters on their legs.

10. As rightly pointed out by the learned counsel for the accused it is also surprising as to why the accused persons who were arrested even on the evening of 3-6-73 had been kept in the police station till 5-6-73. The trial Court appears to have strained itself very much in giving an explanation in support of the prosecution, as regards the delay in judicially remanding these accused persons on the fifth June. The identification parade took place on 18-6-73. The High Court has not adverted to these facts but has conveniently omitted them from its consideration. After going through the evidence of all the witnesses very meticulously and scrupulously we are not convinced about the test identification parade which was the foundation for bringing all the accused as the culprits involved in the dacoity that took place on 26th May, 1973. At any rate a great doubt is entertained with regard to fixing the identity of all the accused. Under these circumstances we feel that the judgment of the High Court below holding that these were the six accused persons who committed the dacoity cannot be sustained. The next question for our consideration is with regard to the recovery of the articles in pursuance of the statements given by the accused persons. According to the prosecution in pursuance of the confessional statement of the second accused Articles Nos. 21, 22, 23, 26, 27 and 30 were recovered. In pursuance of the statement made by the accused No. 5 a watch was recovered. So far as the fifth accused is concerned, there is inconsistent findings between the trial Court and the High Court with regard to the recovery of the wrist watch. So we give the benefit of doubt to the fifth accused. However, we hold that the second accused is liable to be punished under S. 412 of the Indian Penal Code as the evidence relating to the recovery of the articles is acceptable. The next question is whether the prosecution has satisfactorily established that the fifth accused caused the death of Birbal. For the reasons given above, we hold that the prosecution has not satisfactorily discharged its burden in proving that it was the fifth accused who caused the death of the deceased. Therefore this charge has to fail. In the result, we set aside the convictions of all the accused and the sentences imposed therefor and acquit them of the offences of dacoity and murder, charged under Ss. 396, 395 and 395 read with S. 397 and under S. 27 of the Arms Act. We on the basis of the recovery of the looted articles convict the second accused under S. 412 of the Indian Penal Code and sentence him to the period already undergone. The appeals are allowed except to the extent of the conviction of the second accused under S. 412, I.P.C. as indicated above.

Order accordingly.

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