

SUPREME COURT OF INDIA

Arjun Mahto

Vs.

State of Bihar

Crl.A.No.753 of 2001

(Dr. Arijit Pasayat and Dr. Mukundakam Sharma JJ.)

13.08.2008

JUDGMENT

Dr.Arijit Pasayat, J.

1. These three appeals have a common matrix and judgment of a Division Bench of the Patna High Court. By the impugned judgment, the State's appeal was dismissed while in the case of present appellants their conviction was altered from Section 396 of the *Indian Penal Code, 1860* (in short the `IPC') to Section 395 IPC. The sentence of Rigorous Imprisonment for life was altered to seven years rigorous imprisonment.

2. Factual position in a nutshell is as follows:

“The case of the prosecution, briefly stated, as contained in the Fardbayan (Ext.2) of the informant Yusuf Ali Khan son of Khalil Bux Khan (P.W.4) is as follows:

The Fardbayan was recorded at the P.O. Village Khaira, P.S. Auras, District Gaya at 8 p.m. relating to the alleged occurrence of 7 p.m. on the same day on 15.03.1983. The Fardbayan was recorded by Mohd. Asfaque Ali (P.W.5), the officer incharge of Bankey Bazar outpost. It is alleged that the informant was at his house at about 7 p.m. Suddenly 10 armed persons entered into the house through the open door. One of them fired twice from the gun making the informant injured. He fled inside the room. He was dragged into the courtyard where his father Khalil Bux Khan (P.W. 3), and his brother-Nausher Ali Khan (hereinafter referred to as the `deceased) were sitting. On the deceased Nausher Ali Khan injuries with Pharsa and gun shot was caused while Khalil Bux Khan (P.W.3) suffered injuries with lathi and Pharsa. It is mentioned in the fardbayan that the man who caused injuries to the informant with gun shot was of fair complexion and a tall man whose name he did not know. In the meantime 20-25 more persons entered through the door and inside the house and began looting away the household properties. Among them the informant identified as many as 12 persons namely, (1) Bindeshwari Sao (2) Suraj Pasi (3) Ram Lal Chamar, (4) Baijnath Mishra, (5) Bishaum Singh, (6) Arjun Mahato (7) Basudeo Yadav, (8) a

teacher of Bankey Bazar High School resident of village Barka Jamuara, (9) Ram Swarup Ram (10) Lalu Khan and (11) Vijoy Yadav and Sammid Ahmed Khan. The source of identification was the light of lantern burning in the house. The value and the list of the articles was to be furnished subsequently. Altogether 70-80 dacoits were alleged to have participated in the dacoity. While retreating the dacoits had left, the informant came to know that dacoits had also entered into the house of his uncle and grandfather and after causing injuries to them they had also looted away a Licensee gun from their house.

It is said that during investigation after recording the Fardbayan and formal F.I.R. (Ext.3) the I.O. sent the injured persons to the hospital for their medical treatment. Some of the accused persons were also placed in the T.I. Parade and some of the accused were identified by the witnesses in the T.I. Parade. One of the injured named Nausher Ali Khan was removed to Calcutta hospital, where he died, from Magadh Hospital Gaya for further treatment whose P.M. Report was procured by the I.O. from Park Street Police Calcutta. After investigation charge-sheet was submitted by the officer against some of the accused persons named in the F.I.R. and also against some of the accused who were identified in the T.I. Parade and also against some of these who were named subsequently by the witnesses before the investigating police officer whose names neither figured in the F.I.R. nor were said to have been identified in the test identification parade. Some of the accused named in the F.I.R. were not sent up by the police for trial. However, some of them were made accused by the orders of the trial court under Section 319 of the *Code of Criminal Procedure, 1973* (in short 'Cr.P.C.'). Some of the P.Ws were already examined before charge was ordered to be framed against four of the accused under Section 319 Cr.P.C. which resulted in the de novo trial of all the accused persons.

Altogether eight witnesses were examined on behalf of the prosecution. Three of them i.e. Ganzaffar Ali Khan (PW 1), Zahid Ali Khan (PW 2) and Yusuf Ali Khan (PW 4) were three sons of Khalil (PW 2) in whose house the alleged dacoity took place. PW 4 the informant was also seriously injured and according to the prosecution sustained eleven injuries.

The trial court placed reliance on the evidence of all the four witnesses who claimed to be eye witnesses. Placing reliance on their evidence, the trial court held the five appellants in the three appeals before this Court to be guilty of offence punishable under Section 396 IPC. However, he directed acquittal of the eleven co-accused persons. The convicted accused persons preferred two appeals before the High Court while the State preferred an appeal questioning acquittal of Dr. Shamin Ahmad Khan alias Samman Khan. The High Court held that though the evidence of PWs 1 & 3 cannot be said to be cogent, the evidence of PWs 2 & 4 were without blemish. Accordingly it upheld the judgment of the trial court, so far as finding the appellant's guilt is concerned. It found that occurrence took place on 15.3.1983 and the deceased breathed his last long after about a month. That being so the appropriate conviction

would be under Section 395 IPC. Accordingly the conviction was altered and sentence imposed was also altered.”

3. In support of the appeal learned counsel for the appellant submitted that even in the FIR there was no consistency. Though certain persons were named and overt acts were attributed to them the evidence in Court was at variance with the statement. So far as the appellant Bindeshwari Rao is concerned, it is submitted that though he was named in the FIR, the role attributed to him was not specific. It was also submitted that most of the appellants have suffered sentence of nearly 4= years and considering the long passage of time, the sentence should be suitably reduced. In the case of accused appellant Bindeshwari Rao, it is submitted that though he has suffered custody for about one year, considering the unclear role attributed to him by the prosecution his case deserves sympathetic consideration. Witnesses were related to the deceased and their evidence should not be accepted particularly even two of them were dis- believed and the role of Dr. Shamim Ahmad Khan which was so eloquently stated by the witnesses has been discarded.

4. Learned counsel for the State supported the judgment of the High Court.

5. Merely because the eye-witnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. We shall also deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

6. In *Dalip Singh and Ors. v. The State of Punjab*¹ it has been laid down as under:-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

7. The above decision has since been followed in *Guli Chand and Ors. v. State of Rajasthan*² in which *Vadivelu Thevar v. State of Madras*³ was also relied upon.

8. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh's case (supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:

"We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in - *Rameshwar v. State of Rajasthan*⁴. We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

9. Again in *Masalti and Ors. v. State of U.P.*⁵ this Court observed: (p. 209-210 para 14):

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.....The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

10. To the same effect is the decisions in *State of Punjab v. Jagir Singh*⁶, *Lehna v. State of Haryana*⁷ and *Gangadhar Behera and Ors. v. State of Orissa*⁸.

11. The above position was also highlighted in *Babulal Bhagwan Khandare and Anr. v. State of Maharashtra*⁹ and in *Salim Sahab v. State of M.P.*¹⁰.

12. In the instant case, the evidence of the injured witness PW 4 is of vital importance. Similar is the case of PW 2 even though PWs 1 & 3 have not been fully believed yet the credibility of the evidence of PWs 2 & 4 cannot be doubted on that score. So far as the acquittal of Dr. Shamim Ahmad Khan is concerned, the trial court and the High Court doubted prosecution version so far as he is concerned because he was not named in the FIR. It is a serious case of dacoity, any leniency in sentence would not only be undesirable but also would be improper. The passage of time cannot wash away gravity of offence. Therefore, judged from any angle these appeals have no substance and are dismissed.

13. The accused persons who are on bail shall surrender to custody forthwith to serve remainder of their sentence.

14. The appeals fail and are dismissed.

¹(AIR 1953 SC 364)

²(1974 (3) SCC 698)

³(AIR 1957 SC 614)

⁴(AIR 1952 SC 54 at p.59)

⁵(AIR 1965 SC 202)

⁶(AIR 1973 SC 2407)

⁷(2002 (3) SCC 76)

⁸(2002 (8) SCC 381)

⁹[2005 (10) SCC 404]

¹⁰(2007(1) SCC 699)