

PETITIONER:
SHAMBHU DAYAL

Vs.

RESPONDENT:
SUBHASH CHANDRA AND OTHERS

DATE OF JUDGMENT: 19/02/1998

BENCH:
G.T. NANAVALI, V.N. KHARE

ACT:

HEADNOTE:

JUDGMENT:

WITH
CRIMINAL APPEAL NO. 177 OF 1988
J U D G M E N T

Nanavati, J.

Both these appeals, one by the State and the other by the original informant Shambhu Dayal, are filed against the judgment and order passed by the Allahabad High Court in Criminal Appeal No. 731 of 1987. The High Court acquitted all the six respondents, who were convicted and sentenced to death by the court of sessions, Pratapgarh in Sessions Trial Case No. 91 of 1978 for the offence punishable under Section 396 IPC. Respondent Nos. 1, 2 and 4 were also convicted under Section 412 IPC and sentenced to suffer five years rigorous imprisonment.

Briefly stated the prosecution case was that during the night intervening 12/13.10.1977 the six respondents along with one Dinesh committed dacoity in the house of Dal Chand and in order to commit dacoity caused injuries to Manohari Devi, Bimla Devi, Dayavanti, Pradeep, Sandeep, Anita, Dal Chand, Darshani Devi and Surji Devi, out of whom as many six injured, namely, Manohari Devi, Bimla Devi, Dayavanti, Pradeep, Sandeep and Anita lost their lives after some time. It is the prosecution case that during the investigation respondents Bhanu Pratap, Bhola, Ramesh, Virender and Govind were identified by some of the prosecution witnesses. It is also the prosecution case that respondent Subhash, Bhanu Pratap and Ramesh were found in possession of stolen articles, which were discovered at their instance.

In order to prove its case the prosecution examined five eye witnesses - PW-2 to PW-6 - and also led evidence regarding recovery of stolen articles. The trial court believed the prosecution evidence, except against accused Dinesh, and convicted the other accused.

All the convicted accused challenged their conviction by filling an appeal. As they were sentenced to death, a reference was also made to the High Court for confirming the death sentence.

The High Court held that the evidence of the eye witnesses regarding identification of the accused was not believable and so also the evidence regarding recovery of

stolen articles at the instance of accused Subhash, Bhanu Pratap and Ramesh. It, therefore, allowed the appeal filed by the accused and acquitted all of them. Aggrieved by their acquittal State has filed Criminal Appeal No. 177 of 1988 and the original information Shambhu Dayal (PW-4) has filed Criminal Appeal No. 178 of 1988.

The fact that dacoity took place in the house of Dal Chand (PW-3) is not in dispute. It is also not in dispute that in order to commit the dacoity the dacoits had caused injuries to the aforesaid persons, out of whom six lost their lives because of the injuries received by them. What is now left to be considered is whether the evidence regarding identification of the accused and recoveries is so reliable that conviction of the accused ought to have been upheld by the High Court. It was contended by the learned counsel for the State that accused Subhash was known to the witnesses as he was of the same village and residing nearby and the other accused except Dinesh were identified by more than two witnesses in the identification parade held on 11.12.1977. PWs-2 to 6 have stated in their evidence that in view of the frequent thefts that were taking place in the village 60 watt bulbs were kept burning in the three rooms in which they were sleeping and there was also a burning lamp in the court-yard and therefore they were able to properly see the accused. Dal Chand (PW-3) and Darshani Devi (PW-5) have further deposed that when accused Subhash tried to assault Dal Chand (PW-3) he was recognised by Dal Chand and he had also uttered the words 'Are Subhash Tum'. The High Court disbelieved their evidence because PW-6 Krishan Chandra, who was an inmate of the house and had claimed to have seen all the dacoits in light of the electric bulb which was burning in the court-yard, had not named Subhash as one of the dacoits in the FIR. Other intimates of the house had also not named him in their police statements. The High Court has also observed that if Dal Chand (PW-3) had really recognized accused Subhash then he would have disclosed that fact to his relatives in the hospital on 14.10.1977 when he had regained consciousness. The High Court also found his version that immediately after he was discharged from the hospital on 14.10.1977 he did not go to his village but remained at his aunt's place was not believable in view of the seriousness of the incident that had happened. No further treatment was required to be taken at the hospital and therefore there was no reason for him to remain at his aunt's place and not to proceed to his own village. The High Court also doubted correctness of the evidence of the Investigating Officer who had stated that on 14.10.1977 he had visited the hospital but the condition of Dal Chand (PW-3) and Darshani Devi (PW-5) was not good and therefore he could not record their statements. The High Court has observed that if Dal Chand's (PW-3) condition was not good he would not have been discharged from the hospital. Darshani Devi (PW-5) had also disclosed the name of accused Subhash for the first time on 18.10.1977. She has stated that after receiving a blow from one of the dacoits she had become unconscious and regained consciousness only on 18.10.1977. The High Court disbelieved that part of her evidence because Dr. A.K. Jain (PW-9) has categorically stated in his evidence that on 13.10.1977 when he had examined PW-5 her condition was not serious and she was conscious. The High Court, therefore, held that if accused Subhash was one of the dacoits and if there was enough light then the eye witnesses would not have failed to identify him and give his name as one of the dacoits at the earliest point of time, and as his name was not disclosed till

18.10.1977 that indicates that they had really not seen him in their house at the time of the incident.

The evidence of recovery at the instance of accused Bhanu Pratap and Ramesh was not believed as the independent witnesses in whose presence they were alleged to have made the statement and recovered the articles did not support the prosecution. As regards discovery of pant, bushirt and ring (Exh. - 2,3, & 4) at the instance of accused Subhash, the High Court held that though PW-1 supported the prosecution, the evidence in that behalf was so unnatural and improbable that it did not deserve acceptance. The High Court held that it was highly improbable that accused Subhash while committing the dacoits would have taken away bushirt and pant and buried them along with the golden ring in the court-yard of his house. The High Court also found it improbable because he would not have taken the risk of burying the stolen articles in his house as it was only a few yards away from the house of Dal Chand particularly when, according to the prosecution, he was recognised by Dal Chand.

The High Court also doubted the evidence relating to identification of the accused at the identification parades as Dr. Achchan, who was also an eye witness but not examined by the prosecution and was examined as a court witness, has stated that the Investigating Officer had shown the accused to him before the prosecution started. He has further stated that he was tole and pressurized by the Investigating Officer to identify the accused. He has also stated that at the time when the accused were shown to him PW-2, Parvati, was with him. The High Court also took notice of the fact that for seven days the accused were kept in the police station of village Antoo at a distance of only one furlong from the house of Dal Chand (PW-3). The High Court, therefore, held that there was every possibility of the eye witnesses seeing the accused when they were in the police station or the accused being shown to them. The High Court, therefore, set aside their conviction and acquitted them.

It was contended by the learned counsel for the State that the High Court committed a grave error in discarding the evidence of Dal Chand (PW-3) and Darshani Devi (PW-5) as regards the identification of accused Subhash merely on the grounds that his name was not mentioned in the FIR and that they disclosed his name to the police on 18th that is after five days. He also submitted that the evidence of the Investigating Officer and other Police Officers in whose custody the accused had remained, from the time they were arrested till the identification parades were held, have clearly stated that as soon as the accused were taken in custody they were kept Baparda throughout and, therefore, it was to at all proper to hold that there was a possibility that the accused were seen by the witnesses or were shown to them before they were put for identification at the identification parades.

From the evidence it clearly appears that condition of Dal Chand was quite good on 14.10.1977 and, therefore, he was discharged from the hospital. The High Court was, therefore, right in holding that the Investigating Officer was not telling the truth when he stated that he could not record the statement of Dal Chand on 14.10.1977 as his condition was not good. So also the explanation of the Investigating Officer regarding late recording of the statement of Darshani Devi (PW-5) has ben rightly not accepted. Even if late recording of their statements is considered only as an act of negligence on the part of the Investigating Officer, the fact remains that they had not

disclosed the name of Subhash till 18.10.1977 to any one. That creates a serious doubt regarding their having identified Subhash as one of the dacoits. One of the prosecution witnesses has stated that it was suspected by the village people right from morning of the next day that Subhash and his associated has committed the dacoits. It appears that because of suspicion Subhash was involved for the first time on 18.10.1977. It is not believable that in all the rooms in which intimidated of the house were sleeping and also in the courtyard 60 watts electric bulbs were kept burning. The evidence regarding discovery of bushirt, pant and ring by Subhash was rightly rejected by the High Court as it was not probable that while committing dacoits Subhash had taken away clothes also along with the golden ring and buried them in the courtyard of the house. In our opinion, the High Court has given good reasons for not accepting the evidence of PWs.3 and 5 as regards identification of accused Subhash and discovery of pant, bushirt and ring (Exh.2, 3 and 4) of PW-3 and the findings recorded by it do not call for any interference.

Accused -2, Bhanu Pratap was identified by PWs- 2, 3, 4, and 6 at the identification parade held on 11.12.1977. Accused - 3 was identified by PWs - 3 and 6. Accused - 4 was identified by PWs-2 and 3. Accused - 6 was identified by PWs-3 and 6. A-7 was identified by PWs-2, 3, 4 and 6. PW -3 was sleeping along with his wife Darshani Devi on the first floor of the house in a separate room. PW-2, Parvati Devi was sleeping along with her grand-mother Manohari Devi in one of the rooms on the ground floor on the western side of courtyard. According to her evidence she woke up and heard a loud shout raised by her grand-mother. She saw 4-5 persons in the room. One of the dacoits assaulted on the head of her grand-mother with an axe. Other dacoits were having boxes in their hands. She was given a blow by an axe by one of the dacoits and, therefore, she had become unconscious. From her evidence it becomes clear that she had seen the dacoits for a very short time yet she identified A-2, A-4 and A-7. It is difficult to appreciate how these accused were seen by PW-3 Dal Chand in his room situated on the upper floor of the house and also by PW-2 Parvati Devi, who was sleeping in one of the rooms on the ground floor. Both these witnesses have stated that immediately after they woke up they were assaulted and had become unconscious. The evidence also discloses that as soon as shouts were raised the dacoits who had gone up on the first floor came down and left the house from its back side along with those who were on the ground floor. Therefore, their evidence that they had seen those dacoits and so they were able to identify them at the first identification parade becomes doubtful. This conclusion receives support from the evidence of Dr. Achchan who was stated that no one was identified at night and after the accused were arrested they were shown to him and Parvati. In view of this infirmity in the evidence regarding identification it was not safe to place any-reliance upon the identification of A-3 and A-6 by PW-6 also. Moreover, his presence at the time of dacoits was also doubtful as he was not noticed by Dr. Achchan nor his name was mentioned in the complaint given by PW-4 Shambhu Dayal. The evidence discloses that on that day Ram Lila was being performed in that village and it was going on at the time of dacoits.

As we find that the High Court has given good reasons for rejecting the prosecution evidence and acquitting the accused, no interference is called for by this Court. These appeals are, therefore, dismissed.

JUDIS