

STATE OF U.P.
v
BHOORA AND ORS.

OCTOBER 23, 1997

[G.T. NANAVATI AND V.N. KHARE, JJ.]

Indian Penal Code—Section 396 read with Section 34—Dacoity with murder—Identification of accused—Conviction by Trial Court—Acquittal by High Court on re-appreciation of evidence—Held, Prosecution witnesses were playing cards under light from a lantern and two electric pole lights, one in north-eastern direction and the other in north-western direction—Accused, wearing hats and khaki uniform, came from north-western direction to this place and fired at prosecution witnesses and others with them—As accused had come from north-western direction, even if there caps cast shadow on their faces while passing north-western electric pole, light from electric pole in north-eastern direction would have fallen on their faces—Reason that accused were wearing hats and khaki uniform, so could not be identified, is a surmise as this was not suggested to any witness—Accused were known to prosecution witnesses, and if they could recognise the colour of dress worn by accused, they could have recognised their faces also—Conduct of prosecution witness in first going in north-western direction to the place of his brother in law who had a licensed gun, and then in southern direction to police station not unnatural, as he was not expected to act in a cool and collected manner having been attacked by decoits and seen his colleagues being shot dead—Ends of justice could be met by conversion of death sentence to life imprisonment in view of long lapse of time.

The two respondents in this appeal were prosecuted under section 396 read with Section 34 I.P.C. for committing murder, while conjointly committing dacoity along with twenty to twenty five other dacoits. There motive was a grudge against the Brahmins of the village, as uncle of one of the persons attempted to be killed, was a Brahmin and had eloped with their mother, which was taken as an insult by them as they were Ahirs. Four witnesses, PW-1, PW-2, PW-4 and PW-5 were examined by prosecution. According to PW-1 and PW-2 they along with others were playing cards under a shed of the house of PW-1 where a lantern was burning, and there were two electric poles, lights on which were burning, one in north eastern direction at a distance of ten to

A fifteen paces and the other in north western direction at a distance of thirty paces. They got up on hearing some noise coming from north western direction, from side of tube well closely to the village, belonging to RR, brother in law of PW-1. As soon as they got up, they were fired upon and some persons near PW-1 were injured. Immediately PW-1 left that place and first went in the north western direction to the place of RR as he had a licensed gun, but finding him dead, went running in the southern direction to the police station, which was a mile away, and within forty five minutes informed the police officer in charge of the police station about the incident. Five persons died during the incident and three persons were seriously injured.

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C The Trial Court believed the evidence of PW-1, PW-2, PW-4 and PW-5, as it found that there was enough light where incident had taken place and they had sufficient opportunity to see the face of the two respondents, who were already known to them. The Trial Court, therefore, convicted both the respondents under Section 396 read with Section 34 I.P.C. and sentenced both of them to death. The High Court held that the prosecution had failed to establish that the witnesses could have identified the accused for the reasons that the accused were wearing khaki uniform and hats, PW-1 and PW-2 did not have enough time or opportunity to recognise the two respondent accused as the dacoits had started firing as soon as the person sitting in the chhapar got up to see what was happening. The High Court also held that the conduct of PW-1 first going in the north western direction and then to the police station in southern direction was unnatural. In appeal to this Court, it was contended that the reasons given by the High Court for holding that witnesses could not have identified the respondents were neither proper nor sufficient.

F Allowing the appeal, the Court

G HELD : 1. The evidence of PW-1 and PW-2 deserves to be believed. The reason given by the High Court that because dacoits were wearing khaki uniform and were wearing hats casting shadow on their faces, they could not have been identified is in the nature of surmise as this was not even suggested to any of the witnesses. If the witnesses were able to recognised the colour of the clothes worn by the dacoits, surely they could have recognised the faces of those who were already known to them. The High Court accepted the version of witnesses that there were two poles near the house of PW-1 and on both of these lights were burning at the time of the incident. As noticed from the site plan and also from the evidence of witnesses, one electric pole was in the north east to the house of PW-1 and one was towards north west. The accused came

from the north western direction to the house of PW-1 and even if it is assumed that their caps could have cast a shadow over their faces while passing by north western electric pole, then light from the other pole would have fallen on their faces. Besides, PW-1 and others had stood up to see what was happening and were not taken by surprise. [707-G; 708-F; 709-A]

2. As soon as firing had started and some persons standing near PW-1 were injured, within fortyfive minutes even while dacoity was being committed, he had informed the police officer incharge of the police station about the incident and gave the name of the village and names of the two respondents, whom he stated, he had identified because of the electric lights. The High Court overlooked this evidence and committed the mistake of discarding the evidence of PW-1 recording the identity of the respondents.

[709-E]

3. PW-1 was attacked by dacoits and had seen his colleagues being shot dead so he could not be expected to act in a cool and collected manner. He was a frightened person and his conduct in first going in north western direction to the tube-well of RR, as he had a licensed gun, finding him dead, and then going to the police station in southern direction was not unnatural. Nothing was suggested to the Investigating Officer in the cross-examination that FIR was prepared later on. The dead body of RR was found by the Investigating Officer at the tube-well. The High Court committed an error by observing that PW-1 could not have known that RR was murdered when he lodged the report at the police station. [709-G; 709-F]

4. In view of long lapse of time and because of the facts and circumstances of the case, ends of justice would be met by conversion of order of sentence of death of both the respondents to imprisonment for life.[710-D]

CRIMINAL APPELLATE JURISDICTION.: Criminal Appeal No. 91 of 1988.

From the Judgment and Order dated 20.9.88 of the Allahabad High Court in Crl. A. No. 905 of 1983.

T.N. Singh for the Appellant.

T. Vasandi (A.C.) for the Respondents.

The Judgment of the Court was delivered by

NANAVATI, J. The State had filed this appeal against the common

A judgment and order of acquittal passed by the Allahabad High Court in Criminal Appeal No. 905/83 and Reference No. 4/83. Both the respondents were convicted by the Trial Court for the offence punishable under Section 396 read with Section 34 IPC and were sentenced to death.

B The prosecution case was that Bhoora and Vishram Singh, the two respondents herein, along with about 20 to 25 dacoits went to village Aimanpura on 23.11.78 at about 6.30 p.m., killed Raja Ram who was at his tube-well which was very close to the village, then went to the house of Om Prakash and started firing at the persons who were sitting under the 'Chhappar' of his house and then looted property from the houses of Om Prakash and others. Om Prakash somehow managed to escape from that place. He first went to the tube-well of Raja Ram as he was having a licensed gun and who happened to be his brother-in-law, but finding him dead went running to the Police Station which was about a mile away from his village. He informed P.I. Surinder Kumar Singh, who was in-charge of the Police Station, that about 20-25 dacoits including Bhoora and Vishram have come to his village, that they have killed some persons and are still committing dacoity. Thereupon the police party consisting of Surinder Kumar Singh, one police Sub-Inspector and 3 Constables accompanied Om Prakash to the village. They first went to the house of Data Ram. When they disclosed their identity and told him that they have come to the village to render help to the villagers, the dacoits who were in his house opened fire. The police also fired back and thereafter for some time there was an exchange of fire between the police and the dacoits. After some time the dacoits retreated. They were chased by the Police upto a certain distance but because of darkness and the forest being dense had to give up the chase. When the police returned to village they found that Raja Ram, Jay Prakash, Mata Prasad and Ghundari were already dead as a result of the injuries received by them and Datta Ram, Siya Ram and Sudama were seriously injured. Therefore, they made arrangements for sending the injured to a hospital for treatment. Thereafter the investigation started and chargesheet was filed against the two respondents and some others who were absconding. Both the respondents were then tried for committing the offence punishable under Section 396 read with Section 34 IPC.

G In order to prove its case the prosecution had examined four eye witnesses : Om Prakash (PW-1), Data Ram (PW-2), Hardev (PW-4) and Phoolan Singh (PW-5). The Trial Court found that about 5 to 6 years back, uncle of Om Prakash (PW-1) had eloped with the mother of the respondents, and as H the respondents are Ahirs and the person who had taken her away was a

Brahman, they had taken it as an insult and since then they had a grudge against the Brahmans of village Aimanpura and, therefore, on the date of the incident they had gone to the village, killed some persons and committed dacoity. The Trial Court believed the evidence of all the four witnesses as it found that there was enough light where the incident had taken place and that they had enough opportunity to see the faces of the respondents who were already known to them. The Trial Court also believed the evidence of PW-1 and PW-2 that while running away from that village the two respondents had abused Om Prakash by uttering the following words :

“Sale tum aurato ko bhagate ho Aaj to tum apne mehman yani police ko bula laye ho. Aage dekhenge.”

The Trial Court, therefore, convicted both the respondents under Section 396 read with Section 34 IPC. Considering the gravity of the offence committed by the accused, The Trial Court thought that the proper sentence to be imposed upon them was death. Therefore, it sentenced them to death.

As the accused were sentenced to death a reference was made to the High Court for confirmation of the sentence and an appeal was also preferred by the accused against their conviction. The High Court on re-appreciation of the evidence came to the conclusion that PW-4 Hardev and PW-5 Phoolan Singh could not have seen the incident from the place from where they have stated that they had seen the incident and, therefore, could not have identified the accused. The High Court believed the evidence of PW-1 and PW-2 that they along with others were playing cards under the ‘Chhapper’ of the house of Om Prakash and that they got up on hearing some noise coming from the side of tube well of Rajaram which was in the north-western direction. The High Court also believed their evidence that at the material time there was a lantern burning in the shed where they were playing cards and that there were 2 electric poles one in the north eastern direction at a distance of about 10-15 paces and one in the north-western direction at a distance of about 30 paces and that lights on both the poles were burning. The High Court, however, was of the view that as all the accused were in khaki uniform and were wearing hats, the eye witnesses could not have identified the respondents. The High Court was also of the view that the two witnesses did not have enough time or opportunity to recognise the two respondents as the dacoits had started firing as soon as the persons sitting under the ‘Chhapper’ got up to see what was happening. The High Court also did not accept the evidence of these two witnesses that while running away the respondents had made the utterance referred to above for the reason that Datta Ram had not stated

A so before the police and also because Phoolan Singh has stated in his evidence that after the police had come to the village they did not hear any dacoit saying anything. As regards the evidence of motive the High Court was of the view that as the incident of kidnapping had taken place some years back that could not have been the reason for the respondents to commit this offence. The High Court has given one more reason for not believing the evidence of Om Prakash PW-1. It considered his conduct in first going to the tube-well of Rajaram which was in the north-eastern direction and then to the police station which was in the south as unnatural. The High Court, therefore, held that the prosecution has failed to establish beyond reasonable doubt that respondents were among the dacoits who had committed the dacoity in the village on that day.

The learned counsel for the appellant submitted that the reasons given by the High Court in holding that the witnesses could not have identified the respondents are neither proper nor sufficient. He has taken us through the evidence of PWs. 1, 2, 4, 5 and 6 all of whom have deposed about the presence of two electric poles near the house of Om Prakash. We find that this part of their evidence has remained almost unchallenged. The only attempt made by the defence in this behalf was to put a question to PW-2 in cross-examination whether he had drawn the attention of the police officer to the existence of the second electric pole towards the west of Om Prakash's house. Possibly this question was put to him because in the site plan prepared by the Investigating Officer the second pole situated in the western direction of the house of Om Prakash has not been shown. The Investigating Officer has stated in his evidence that immediately on being informed by Om Prakash, he had gone to the village and at that time he had noticed that lights on both the electric poles were burning. This part of his evidence has remained unchallenged in cross-examination. As stated earlier even the High Court has accepted the version of the witnesses that there were two poles near the house of Om Prakash and on both of them lights were burning at the time of incident. It was no body's case that the light was so insufficient that from a distance of 30 paces a person standing near the electric pole could not be identified. The reason given by the High Court that because dacoits were wearing khaki uniform and were wearing hats they could not have been identified appears to be more in the nature of a surmise, as it was not even suggested to any witness that because of the hats worn by the respondents there was shadow on their faces and, therefore, it was not possible to recognise them. It is difficult to appreciate the reasoning of the High Court. If the witnesses were able to recognise the colour of the clothes worn by the

dacoits, surely they could have recognised their faces also of those who were known to them. As noticed from the site plan and also from the evidence of the witnesses, one electric pole was to the north-east of the house of Om Prakash and one was towards north-west. The accused had come from the north-western direction and even if it is assumed that their caps could have cast a shadow over their faces while they were passing by the north-western electric pole then light from the other pole would have fallen on their faces. Om Prakash and others had stood up to see that what was happening. Thus they were not taken by surprise. Therefore, their evidence that they stood up and noticed that there were about 20-25 persons about 30-35 steps away from the house deserves to be believed. The reasons given by the High Court for disbelieving the evidence of Om Prakash and Data Ram, therefore, cannot be regarded as proper and sufficient and we hold that their evidence deserves to be believed. The High Court overlooked the fact that as soon as firing had started and some persons standing with him were injured Om Prakash left that place and went to the police station. He informed the police officer in-charge of the police station that about 20-25 dacoits have come to the village and were committing dacoity in his house. He further stated that they had killed Jai Prakash, Raja Ram and Gundhari and other persons have also been injured. He had further stated that he had recognised Bhoora and Vishram of village Mandanpur in the light of the two electric poles. Thus within 45 minutes even while dacoity was being committed in the village, Om Prakash had stated that he had identified two of them because of the electric lights. If the High Court had considered this piece of evidence along with the oral testimony of Om Prakash, then possibly it would not have committed the mistake of discarding his evidence as regards the identity of the respondents. The High Court also committed an error when it observed that Om Prakash could not have known that Raja Ram was murdered when he had lodged the report at the police station. It discarded the explanation given by him that he first went to the tube-well of Raja Ram and, therefore, he had come to know about the death of Raja Ram. As stated earlier the High Court found the conduct of this witness unnatural as the tube-well was in the north-western direction and the police station was situated in the southern direction. This reasoning of the High Court appears to us highly unreasonable because a person who was attacked by dacoits and had seen his colleagues being shot dead could not be expected to act in a cool and collected manner. He was a frightened person and had thought fit to first go to the tube-well of Raja Ram as he was having a licensed gun. Such a conduct can hardly be regarded as unnatural. Moreover, nothing was suggested to the Investigation Officer in the cross-examination that FIR was prepared later on. Om Prakash would not have come to know

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A about the death of Raja Ram unless he had gone to tube-well where his dead body was found later by the Investigating Officer. In our opinion the High Court was wrong in discarding the evidence of Om Prakash on the ground that his conduct in going to the tube-well of Raja Ram and then to the Police Station was unnatural.

B As we find that the reasons given by the High Court for disbelieving the prosecution evidence are not at all proper and that has led to the failure of justice, the order of acquittal passed by the High Court will have to be set aside.

C In the result we allow this appeal, set aside the acquittal of the respondents and convict them under Section 396 read with 34 IPC. Though we are thus restoring the judgment and order passed by the Trial Court, we do not think that we should also restore the order of sentence passed by it. In view of long lapse of time and also because of the facts and circumstances of the case, we are of the opinion that ends of justice would be met if both
D the respondents are ordered to suffer imprisonment for life. They shall surrender to custody to serve out the remaining period of sentence. The State is also directed to take steps to secure their presence in jail for that purpose.

VS.

Appeal allowed.