
(1984) 04 OHC CK 0017

In the Orissa High Court

Case No : Jail Criminal Appeal No. 309 of 1983

Baidhar Patra alias Makara and Madan alias Subash Pradhan	APPELLANT
Vs	
State of Orissa	RESPONDENT

Date of Decision : 18-04-1984

Acts Referred:

Penal Code, 1860 (IPC) — Section 395

Citation : (1984) 1 OLR 442

Hon'ble Judges : B.K. Behera, J

Bench : Single Bench

Advocate : P.K. Dhal, D. Kayak and P. Mohanty, for the Appellant; A. Rath, Additional Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

B.K. Behera, J.—The appellants Baidhar Patra alias Makara and Madan Khatua, besides four other co-accused persons, namely, Suresh Chandra Das, Sarbeswar Panda, Mohan alias Subash Pradhan and Jaladhar Das alias Jena, stood charged u/s 395 of the Indian Penal Code for having committed dacoity in the 203 Up running train in between Soro and Sabira Railway Stations at about 10. 30 P.M. on November 17,1981, in the course of which they were alleged to have used deadly weapons, kept the passengers including P. Ws. 1 to 5, 14 and 19 under awe and removed a number of articles from the possession of Jagadish Biswakarma (P. W. 19) who had been moving with his family members and also from other: persons and decamped when the train was about to stop at the Sabira Railway Station. With some money borrowed from Sk. Abdul Khalil (P. W. 18.), P. W. 19, one of the victims, returned to Kharagpur with his family members. Investigation was taken up by the Officer-in-Charge of the Government Railway Police Station (P. W. 20). The address of the main victim (P. W, 19) was ascertained in the course of investigation on March 22, 1982 and P. W. 20 examined P. W. 19 on May 12, 1982. Some articles removed during commission of dacoity had been recovered from the possession of the two

appellants, as sought to be established by the prosecution. Of the twenty-one witnesses examined at the trial, there was the evidence of identification of the culprits by P. Ws. 1, 4, 5, 14 and 19. Recoveries of articles removed during the commission of dacoity had been testified by P. Ws. 16, 21 and the Investigating Officer (P. W. 20.) The plea of the appellants and the co-accused persons was one of denial. They had not examined any witness in their defence.

2. On a consideration of the evidence, the learned trial Judge did not place implicit reliance on the testimony of P. Ws. 4 and 5 and as has been submitted at the Bar, none of these two witnesses had identified any of the suspects at the test identification Parade. It admits of no doubt from the evidence that a dacoity had been committed in the running train by more than five persons. Mr. Dhal, the learned counsel for the appellants, has invited my attention to the suspicious features in the evidence of P. Ws. 1, 14 and 19 and has submitted that their evidence of identification did not deserve credence and ought not to have been accepted. The learned Additional Standing Counsel has supported the conviction as well-founded on the evidence on record.

3. Coming first to the evidence of P. W 1, who was undoubtedly one of the passengers in the running train, it would be noticed that he had not known the two appellants from before. There was no evidence that he had given the identifying features of the appellants before any one. He had, no doubt, identified the two appellants at a Test Identification Parade on July 19, 1982, but as would be clear from the evidence, that was a date fixed for the case in the court of the learned Chief Judicial Magistrate at Balasore and while one of the appellants, namely, Madan Khatua had been produced in custody, the other appellant Baidhar, who was on bail, was present in the court and thus P. W. 1 had an opportunity of seeing these two persons before the Test Identification Parade was held in the court later on the same day. That apart, the occurrence had taken place in November, 1981 and the Test Identification Parade had been conducted about eight months thereafter. It would be difficult, in the circumstances of the case, for P. W. 1 to have remembered the identifying features of the two appellants who had allegedly committed dacoity in November, 1981 so that he could properly identify them about eight months thereafter at the Test Identification Parade. P. W. 1 had admitted in his evidence that he had not stated to the Investigating Officer that he would be able to identify some of the culprits who took part in the occurrence. In such circumstances, the evidence of identification of the two appellants by P. W. 1 could not safely be accepted. In this connection, reference may be made to the observations of the Supreme Court in AIR 1981 Supreme Court 1392 Wakil Singh and Ors. v. State of Bihar.

4. Coming next to the evidence of identification of the appellant Baidhar by P.W. 14, it would be noticed that this appellant was not known to P. W. 14 from before. In his evidence in the court recorded more than one and a half years after the occurrence, i.e., on July 19, 1983, he had identified this appellant in the court although he had not identified him at any Test Identification Parade. There

was no evidence that this witness had disclosed to any one the identifying features of any culprit whom he could identify. The evidence of P. W. 14 in this regard did not deserve credence.

5. It would be seen from the evidence of P. W. 19 recorded on July 22, 1983, that he had identified the two appellants in the court as two of the culprits. Belonging as he did to Bihar, he had not known these two appellants from before. He had not given the facial or other identifying features of the persons whom he could identify at any time prior to the identification by him of the two appellants for the first time in the court. He had been called to the Test Identification Parade, but he did not attend. His evidence of identification in the court had not been tested by prior identification of any of the two "appellants at a Test Identification Parade. Such evidence is not worthy of credence, as held by the Supreme Court in AIR 1980 Supreme Court 1382 State (Delhi Administration) v. V.C. Shukla and Anr., P. W. 19 had admitted in his cross-examination that he had not stated to the Investigating Officer that he could recognise the culprit who snatched away the attached and the wrist watches from him and from his wife and the culprits who had been standing holding a dagger drawn out and the other culprit who was standing near them. It would thus be clear from these statements that he was not in a position to identify the culprits. If so, it would not be possible for him to properly identify the culprits in the court long after the occurrence. Regard being had to these suspicious features and infirmities in his evidence, the evidence of identification of P. W. 19 with regard to the two appellants could not be accepted.

6. Coming next to the recoveries of articles allegedly removed during the commission of dacoity, there was the evidence of P. W. 16 and P. W. 20, the Investigating Officer, that a number of articles had been recovered from the house of Panu Giri, the father-in-law of the appellant, Madan Khatua, where the latter was said to be residing. According to P. W. 16, he reached the spot after the recoveries. Thus he had not, in terms, stated in his evidence that he had seen the recoveries from the house of the father-in law of this appellant. There was no evidence of any one that recoveries of the articles had been made from any part of the house in the sole occupation of the appellant, Madan. As has been submitted at the Bar, it had not been established by the prosecution that this appellant was in exclusive and/or conscious possession of the articles in question. In this state of affairs, merely because some articles belonging to P. W. 19 had been recovered from the house of Panu Giri, where the appellant, Madan was said to be residing, it could not be said that the articles had been recovered from the possession of this appellant.

7. As regards the recoveries of some articles from the possession of the other appellant Baidhar Patra, the prosecution had placed reliance on the evidence of P. W. 20. P. W. 21, examined in this regard, had not supported the case of the prosecution. The Investigating Officer (P. W. 20) had spoken about recovery of some articles from the possession of this appellant which had been identified by

P.W. 19 as belonging to him. In his statement before the trial court, this appellant had claimed the Saree (M. O. LXXIH) and the towel (M. O. LXXV) as belonging to him and his wife. No doubt, P.W. 19 had identified these properties in the court as belonging to him, but as has rightly been submitted by the learned counsel for the appellants, he had not given a list of properties belonging to him which had been removed during the commission of dacoity. He had not identified M.Os. LXXIII and LXXV in a test identification parade. Such articles are of common use and are available in the market. In the absence of any other evidence, it would not be safe and proper to accept unreservedly the evidence of P. W. 19 in this regard and hold that these two material objects did belong to him.

8. There was no other evidence to connect the appellants or any one of them with the commission of the offence of dacoity. The appellants could not be convicted for the commission of the offence with which they stood charged.

9. In the result, I would allow the appeal and set aside the order of conviction and sentences passed against the two appellants u/s 395 of the Indian Penal Code. The appellants be set at liberty forthwith.

10. In view of the findings recorded by this court, the order of disposal of the properties is modified to the extent that M. Os. LXXIII and LXXV shall be returned to the appellant Baidhar Patra. This order of disposal is to be carried out after the period for preferring an appeal by the State against this judgment and is over, if no appeal is preferred and if an appeal is preferred, after disposal of the same.