
(2010) 02 PAT CK 0044

In the Patna High Court

Dasai Ahir @ Yadav, Harihar Singh and Gorakh Singh @
Mudhi Singh

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 23-02-2010

Acts Referred:

Penal Code, 1860 (IPC) — Section 396

Citation : (2010) 02 PAT CK 0044

Hon'ble Judges : Dharnidhar Jha, J;Birendra Prasad Verma, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Dharnidhar Jha and Birendra Prasad Verma, JJ.—The three appeals arise out of the judgement passed by the learned 7th Additional Sessions Judge, Bhojpur at Arrah on 9.6.1988 in Sessions Trial No. 325 of 1982. While the three appellants were held guilty of committing offence u/s 396 of the IPC, some others like, Ram Dular Mushahar and Barhu Mushahar were acquitted of the said charge. While being heard on sentence on the same day, the learned trial Judge directed each of the appellants to serve rigorous imprisonment for life for their individual conviction u/s 396 of the Penal Code. The appellants question the propriety of the above judgement of conviction before this Court through the three connected appeals.

2. The prosecution case as contained in Ext-3 which is the FIR of P.W.6 Munshi Yadav, the informant of the case is that at about 12.30 in the night intervening the 4th and 5th of October, 1981, the three appellants along with 15-20 other dacoits came to the house of the informant. They picked up a bamboo lying there and put it by the wall of the house and climbed up the wall on to the roof. The culprits shot and killed Ram Nath Yadava, the son of P.W.6 who was sleeping with his wife there. Thereafter, they unbolted the doors of staircase to climb down the roof so as to entering the house for plundering the properties contained therein. It was alleged that properties like ornaments, clothes, utensils and cash of about

Rs. 2500/- were taken away by the dacoits.

3. The informant indicated the identifying features of the dacoits in his FIR and stated that they were clothed in Lungi, Kurta, Dhoti, half Kurta and simply in Ganji also. Some of them appeared belonging to a particular caste and they were abusing the female inmates of the house and they were commanding them to show the cash kept therein. One of the dacoits was wearing a long cloth and he was a bit shorter and had painted his face in black so as to concealing his identity.

4. The informant claimed to identify the dacoits who had participated in the commission of the dacoity along with his other family members and further stated that they left the house by running towards the north.

5. It was alleged by the informant that a week prior to the occurrence, the two appellants, Dasai Ahir alias Yadava and Harihar Singh had come to his house for realizing some money which had been lent by them and on that account there was some hot exchange of words and as such the money could not be paid to them, as a result of which they had threatened the informant of incurring loss both in person and properties.

6. The case was investigated into by P.W.8 S.I. Janardan Pandey who recorded the statement of other persons accompanying the deceased who had gone to the police station with the dead body of his son. P.W.6 held inquest on the dead body and prepared the Inquest report, Ext-4 and thereafter sent the dead body for postmortem examination. P.W.8, thereafter left for the place of occurrence and inspected the same which was the Pucca house of the informant situated at village Semardah. The informant found blood fallen in the western corner of the ceiling of the building and a Palani was found about 15 yards north of that Pucca building. The investigating officer seized the blood from the place of occurrence and prepared the seizure memo. He also prepared a rough sketch map of the place of occurrence. He recorded the statement of the informant and his family members and organized test identification parade by putting accused Barhu Mushahar and Rambilash Mushahar for identification.

7. As may appear from the cross-examination part of the evidence of P.W.8 S.I. Janardan Pandey, there was no Chauki or bed kept in the Palani. We will discuss the relevance of this finding a bit later. No bamboo was also found by the investigating officer anywhere around the house of the informant. No articles kept in the house were found scattered inside the house so as to indicating that the house had been plundered. He did not find any boxes broken either. The I.O. has very categorically stated that he did not find any mark of violence except the blood which was seized by him. After completing the investigation, P.W.8 sent up the accused persons for trial.

8. During the course of the trial in addition to the examination of P.W.8 S.I. Janardan Pandey ten more witnesses were examined, out of whom P.W.5 Murat Ram and P.W.9 Mohan Singh Yadava were witnesses of formal character. They exhibited different documents of the prosecution. P.W.4, Manbasiya Devi was

tendered for cross-examination. P.W.1 Ramashankar Yadava was the son of the deceased whereas P.W.2, Fuleshari Devi was the wife of the deceased and mother of P.W.1. P.W.3, Shanti Devi was the wife of P.W.1, Ramashankar Yadava. P.W.6, Munshi Yadava, as indicated earlier, was the informant of the case and father of the deceased. P.W.7, Dr. Hira Lai Gupta was the medical officer who held postmortem examination and prepared the report Ext-3. P.W.9, Mohan Singh Yadav was a witness to inquest report and P.W.10, Dharichhan Yadava was also a witness to the same document, i.e., the inquest report which has been marked as Ext-4, P.W.11 Mahendra Prasad Singh was the Judicial Magistrate who oversaw the holding of test identification parade and prepared a chart in that behalf which has been marked Ext-5.

9. On consideration of the evidence of the above named witnesses the court passed the judgement in question.

10. We have heard Sri Anil Kumar Mishra, learned Counsel appearing for appellants, Dasai Ahir @ Yadava and Harihar Singh and also Sri Ganesh Prasad Singh, the learned Counsel appearing for appellant Gorakh Singh @ Mudhi Singh. We have also heard Sri Dilip Kumar Sinha, the learned A.P.P. appearing in the three appeals for the State.

11. It was contended by the learned Counsel for the appellants that the very finding of the learned trial Judge on proof of charges as recorded in paragraph 33 and 34 of the judgement is so contrary to each other as not to be acceptable on account of being perverse.

12. The witnesses appeared motivated to make false statement before the court as regards the identification of the three appellants during the course of the occurrence for a particular reason which is admitted in the FIR, besides, the fact as appears admitted by some more witnesses like P.W.1 in paragraph-7 and P.W.2 in paragraph-6. It was contended that as regards the claim of the informant that the three appellants were identified by him, it appears falling to the ground inasmuch as while deposing in court P.W.6 was wavering in identifying the appellants correctly. As regards the evidence on identification of appellants coming from other witnesses, the same is not acceptable as it suffers from inherent probability and patent absurdity because the very basic document of the prosecution, i.e., the FIR indicates that some culprits had taken precautions to conceal their identities. It was contended that it was simply absurd to think that those like the three appellants who were known to the whole of the family from quite some long, could be coming to commit such a ghastly crime without taking any precaution to conceal their identities. It was contended that the claim of P.Ws.1 and 6 that they were sleeping together in the Palani on a Chauki appears not acceptable as well. Sri Sinha, the learned A.P.P. has been very fair in pointing out to us that the learned trial Judge, himself was at a fix as to what could be his finding also on the proof of charge, as in one paragraph he was holding that the prosecution had not succeeded in proving the charge u/s 396 of the IPC of course, in respect of one set of accused persons but in the

other paragraph, he was changing his opinion to hold that the charges were proved to the hilt. It was contended that besides, the evidence which has been pointed out by the Counsel for the appellant appears fake.

13. It is admitted from the very FIR that there was some dispute between the deceased and the informant on the one hand and the two appellants; Dasai Ahir alias Yadava and Harihar Singh on the other for making or taking payment of some money. Witnesses, like P.W.1 in paragraph 7 at pages 8 and 9 of the paper book as also P.W.2 in paragraph 6 appear admitting that the deceased had borrowed some money from the two appellants or from either of them. They have, however, admitted directly or indirectly, that there were some dispute and some ruckus in between the parties for payment or non-payment of the borrowed money. They have come out with the story that the appellants had threatened that the informant shall incur loss both of person and properties. If this could be the background then it is assumed that the appellants will not go into the house to commit such a ghastly offence bare face. It is presumed that they could enter the house only after they had taken sufficient precaution to conceal their identities. This is more evident from the fact that the informant made a statement at the earliest opportunity in the FIR which he denied during his cross-examination in paragraph 12 of his evidence. The written document is there in the form of Ext-3 and that contains the averment of P.W.6 that a dacoit had painted his face black so as to concealing his identity. If this could be the attempt of a person who was not known to the witnesses, why should those who were very much known to them, could go bare face into the house to commit the offence.

14. The other aspect on identification is that when the informant was deposing in court he was asked to identify the accused persons in paragraph 3 of his evidence and the learned trial Judge who recorded the evidence of P.W.6 has noted that he was identifying a wrong person by a wrong name. Thus, the fact that he could have identified the accused persons correctly pails into doubt. This is compounded more by the fact that the witnesses had admitted in paragraph 6 that he had a defective eye sight and he suffers with that defect since quite some time. The court is not inclined to accept this explanation of P.w.6 inasmuch as he has stated in paragraph 7 that he was attending to his household and agricultural cores which in our opinion requires some good vision.

15. We find the evidence of P.Ws.1, 2 and 3 namely, Ramashankar Yadava, Fuleshari Devi and Shanti Devi not acceptable to us for the same reason as we have assigned just now while discussing the evidence of P.W.6 Munshi Yadava, the informant. The three has stated that the appellants were a regular visitor to their house and they had seen them on quite some occasions. They were also residents of a neighboring village. Besides, the appellant, Dasai Ahir alias Yadava was serving in the railways with the deceased. This could be the reason that the deceased had borrowed some money from him. The same reason is attracted for not accepting the evidence of these three witnesses as the appellants could not

be expected to go into the house of the witnesses without concealing their faces to commit dacoity.

16. While rejecting the evidence and the witnesses we never mean that no occurrence had taken place. An occurrence had been taken place and in that occurrence the deceased Ram Nath Yadava was murdered. But, we simply doubt the participation of the three appellants in commission of the offence. The learned trial Judge appears also holding contradictory views as regards the proof of the charge u/s 396 of the Penal Code. In paragraph 33 he was holding that the charge had not been established but in the next paragraph he was recording a finding that the charge was established beyond all shadow of reasonable doubt. This approach could not find favour with us. In our opinion, it was a case in which the court ought to have held that the participation of the appellants was a matter to be doubted and on that account the benefit of doubt ought to have been extended to them. We extend that benefit to the three appellants by allowing the three appeals. The appellants are on bail. They shall stand discharged from the liabilities of their respective bonds.