
(2008) 02 PAT CK 0027

In the Patna High Court

Case No : Criminal Appeal No. 437 of 2004 (SJ)

Lal Babu @ Lal Bahadur Paswan and Another

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 15-02-2008

Acts Referred:

Penal Code, 1860 (IPC) — Section 395

Citation : (2008) 3 PLJR 288

Hon'ble Judges : S.C. Jha, J

Bench : Single Bench

Advocate : Abdul Hakim and Rakesh Kumar, for the Appellant; Satya Narayan Prasad, for the Respondent

Final Decision : Allowed

Judgement

Subash Chandra Jha, J.—Appellants Lal Babu alias Lal Bahadur Paswan, son of Ram Prasad Paswan, resident of village Mohanpur, P.S. Raiyam, District Darbhanga and Chandeshwar Mandal, son of Kari Mandal, resident of village Nayagawn, P.S. Raiyam, District Darbhanga, have filed this appeal against the order dated 21.6.2004 passed in Sessions Trial No. 201/99 passed by learned 2nd Additional Sessions Judge, Darbhanga, whereby and whereunder the appellants alongwith one Pulkit Paswan have been held guilty, convicted and sentenced to undergo rigorous imprisonment for five years and imposed fine of rupees one thousand, in default of which to undergo imprisonment for three months for offence u/s 395 of the Indian Penal Code. These two appellants alongwith Pulkit Paswan, Md. Zubair Kasturi and Ramu Paswan faced trial for the aforesaid offence but Md. Zubair Kasturi and Ramu Paswan have been acquitted on consideration of evidence and material collected in course of trial by the trial court. Another convict Pulkit Paswan has not joined these two appellants in filing this appeal. It has been submitted that appellant no. 2 Chandeshwar Mandal has served the sentence and came out from jail. Further submission is that appellant no. 1 Lal Babu alias Lal Bahadur Paswan has no criminal antecedent, who is now

employed as a Govt. teacher in a primary school.

2. An FIR was drawn on recording fardbeyan of the informant Ram Prasad Gupta (P.W. 12) in respect of commission of dacoity in the night of 27/28th December, 1998, committed in his house as also in the combined house of his nephews, wherein only ornaments, gold and silver and stones were looted away by putting the informant, his family members as also female inmates in constant fear. The informant has claimed to identify four of the dacoits, namely, Sahdev Paswan, Uttam Paswan, Ratan Paswan and Jai Narayan Paswan. Similarly, his nephew Sanjay Kumar Gupta (P.W. 5) also claims to identify Manoj Mandal, Gulati Paswan, Ramu Paswan and Sudisht Paswan, who had participated in the commission of dacoity. Son of the informant Rakesh Pd. Gupta (P.W. 4) also claims to identify Lalit Paswan and Rusa Paswan and in this way in all ten persons were named in the FIR. Out of them only Ramu Paswan faced trial, as stated above, alongwith other accused persons. But this Ramu Paswan and one Md. Zubair Kasturi were acquitted by the trial court as their complicity in the dacoity was not substantiated from the evidence of the informant and other witnesses examined in course of trial.

3. So far these appellants are concerned, their complicity transpired on the ground 5-6 unknown criminals had also participated in the commission of dacoity. The informant, his sons and nephew, i.e., almost all male members of the family had participated in the test identification parade held inside the jail where these appellants and other accused persons were lodged. In the first test identification parade (Ext. 2) so held, the informant Ram Prasad Gupta (P.W. 12), Rakesh Kumar Gupta, son of the informant (P.W. 4), Umesh Kumar Gupta, another son of the informant (P.W. 6) and Sanjay Kumar Gupta (P.W. 5) had participated in which informant Ram Prasad Gupta, his son Rakesh Kumar Gupta and his nephew Sanjay Kumar Gupta had identified Chandeshwar Mandal, appellant no. 2.

4. The test identification parade chart has been exhibited as Ext. 2. The Judicial Magistrate Sri K.N. Pandey (P.W. 15) has proved the test identification parade chart and as per his deposition the test identification parade was held by observing all norms and formalities for such holding of test identification parade. In the facts and circumstances, the participation of appellant Chandeshwar Mandal is established.

5. So far involvement of Lal Babu alias Lal Bahadur Paswan, another appellant, is concerned, he claims to have been identified by the informant Ram Prasad Gupta (P.W. 12) and his nephew Sanjay Kumar Gupta (P.W. 5) in the test identification parade, vide Ext. 2/A. Ext. 2/A is another test identification parade chart with respect to test identification parade held on 28.1.99.

6. Submission has been advanced that such test identification parade of the appellant was held after he remained in custody for about 57 days. It has also been submitted on behalf of the appellants that the Judicial Magistrate Sri Manoj

Kumar Tiwary, holding such test identification parade, has not been examined as a prosecution witness, rather such test identification parade chart has been proved by a formal witness. Moreover, my attention has been drawn to the overwriting in the test identification parade chart itself so as to show that appellant Lal Babu alias Lal Bahadur Paswan has been shown to have been identified in the test identification parade. According to this test identification parade chart, both Lal Babu alias Lal Bahadur Paswan and Pulkit Paswan were claimed to have been identified in the test identification parade (vide Ext. 2/A) but so is not the evidence as recorded in course of trial. P.W. 5 Sanjay Kumar Gupta in his deposition in the court has clearly stated that he identified only Pulkit Paswan in the test identification parade. The appellant Lal Babu alias Lal Bahadur Paswan was put to test identification parade alongwith Pulkit Paswan when informant and his nephew Sanjay Kumar Gupta had gone inside the jail to participate in the test identification parade for the purpose of identification. So, in that context of the matter, i.e., due to absence of claim of identification of Lal Babu alias Lal Bahadur Paswan in the test identification parade by Sanjay Kumar Gupta; the whole test identification parade, so held, has become highly doubtful. Learned Judicial Magistrate Sri Manoj Kumar Tiwary, who had conducted such test identification parade has not been examined and so the test identification parade chart cannot be the sole basis for holding the appellant Lal Babu alias Lal Bahadur Paswan guilty only on that count. Now, the evidence of Ram Prasad Gupta, the informant, remains only on the record for the purpose of appreciation of guilt of Lal Babu alias Lal Bahadur Paswan.

7. It has been argued on behalf of the appellants that evidence of the informant cannot be relied upon in view of the fact that in spite of their naming of Ramu Paswan at the time of commission of dacoity, they did not support such factum of participation of Ramu Paswan in the dacoity and on that score alone, evidence of these two witnesses should not be considered as the sole basis for holding appellant Lal Babu alias Lal Bahadur Paswan guilty for the offence.

8. In course of trial, almost 17 prosecution witnesses have been examined on behalf of the State for the purpose of substantiating the charge framed against the accused persons. Almost all of them happen to be female inmates and male members of the informant's family. Only one neighbour Pradeep Kumar Gupta has been examined besides P.W. 14, a villager of the informant.

9. P.W. 1 Pradeep Kumar Gupta has simply stated about the commission of dacoity in the house of the informant but did not claim to identify any of the dacoits.

10. It has been argued that other male members of the family of the informant, no doubt, has participated in the test identification parade but none of them has identified the appellant Lal Babu alias Lal Bahadur Paswan.

11. P.W. 2 Srikant Pd. Gupta, P.W. 3 Rajesh Pd. Gupta, P.W. 6 Umesh Pd. Gupta, P.W. 4 Rakesh Pd. Gupta, P.W. 5 Sanjay Kumar Gupta are the adult male

members of the family of the informant. Similarly, P.W. 7 Manorma Devi, P.W. 8 Ragni Gupta, P.W. 9 Sandhya Gupta, P.W. 10 Hemlata Devi happen to be wife" and daughters-in-law of the informant but none of them has stated regarding participation of the appellants. They have simply stated about commission of dacoity and looting of ornaments and valuable articles from their lockers and boxes. P.W. 11 Shyam Pd. Gupta, brother of the informant, has also not identified either of the appellants. P.W. 13 Shambhu Nath Jha, a village Doctor, claims to have initially treated the victims, who sustained injuries in course of commission of dacoity. P.W. 14 Naresh Ram, a labourer, has also not stated regarding participation of these appellants. P.W. 16 Mridula Kumari is the LO. of the case, who has performed investigation and submitted charge-sheet although she claims to be present at the place of occurrence when fardbeyan of the informant was recorded but no tangible work could be said to have been performed by her so as to recover looted articles from the other dacoits, whose names have been mentioned in the FIR. It would not be out of place to mention that out of ten accused persons, named in the FIR, nine of them could not be apprehended in course of investigation by the I.O. rather charge-sheet was submitted against four unknown and one named in the FIR indicating continuance of investigation against nine named accused persons of the FIR. The failure of the LO. is manifest from the fact that all such named accused persons of the FIR alongwith their names and villages have been mentioned, which is situated in the vicinity of the P.O. village but no such effort seems to have been taken by the I.O. to recover the looted articles, to apprehend the accused persons named in the FIR. She simply seems to have performed her formalities and submitted the charge-sheet.

12. P.W. 17 Arun Kumar is a formal witness, who has proved the test identification parade chart, Ext. 2/A. He has nothing to do either with the apprehension or investigation.

13. In the facts and circumstances, it would be deemed that informant has for the first time stated regarding involvement of the appellant Lal Babu alias Lal Bahadur Paswan in the court. If Lal Babu alias Lal Bahadur Paswan was known to him from before, in view of the fact that he happens to be a resident of village Mohanpur, definitely informant could have named him in the FIR. Informant claims to have named several persons of the same village Mohanpur, who, according to him, had participated in the dacoity. So, involvement of Lal Babu alias Lal Bahadur Paswan at a later stage, such exoneration of Ramu Paswan of the same village by the informant, his nephew and other male members of his family are indicative of the fact that a well calculated and afterthought evidence has been led against the appellant Lal Babu alias Lal Bahadur Paswan. The overwriting in the test identification parade chart (Ext. 2/A) by encircling witness no. 4 coupled with non-examination of the Judicial Magistrate Sri Manoj Kumar Tiwary, are sufficient to hold that prosecution has not successfully discharged its onus, as required under the law for holding appellant Lal Babu alias Lal Bahadur Paswan guilty beyond all reasonable shadow of doubts. Moreover, informant has nowhere stated about manner of participation in dacoity and role played by the

appellant Lal Babu alias Lal Bahadur Paswan.

14. In the facts and circumstances, the order of conviction and thereby imposition of sentence awarded to the appellant Lal Babu alias Lal Bahadur Paswan is not sustainable on facts as also on law and, as such, is, hereby, set aside. He is said to have been released on bail earlier. So, he is discharged from the liabilities of the bail bonds.

15. So far merit of appeal in respect of appellant no. 2 Chandeshwar Mandal is concerned, he seems to have been identified in the test identification parade conducted by Sri K.N. Pandey, Judicial Magistrate, on 23.2.99 (Ext. 2), in which this appellant Chandeshwar Mandal has been identified by the informant (P.W. 12), Sanjay Kumar Gupta (P.W. 5), Rakesh Pd. Gupta (P.W. 4). Their identification finds corroboration from the testimony of learned Judicial Magistrate Sri K.N. Pandey (P.W. 15). Moreover, learned counsel for the appellants in view of release of this appellant from jail after serving out the sentence could not point out any infirmity in the impugned order and judgment and sentence of this appellant Chandeshwar Mandal. So, the order of conviction does not require any interference. So far quantum of punishment is concerned, he has already served the sentence and came out from jail. So, the order of sentence is modified only to the extent of his period already undergone and that there shall not be realization of fine from him. In the result, the appeal is allowed in part.