

(1990) 06 OHC CK 0020

In the Orissa High Court

Case No : Criminal Appeal No. 321 of 1983

Laxman Mohanty and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 20-06-1990

Acts Referred:

Penal Code, 1860 (IPC) — Section 395, 457

Citation : (1990) 70 CLT 827

Hon'ble Judges : V. Gopalaswamy, J

Bench : Single Bench

Advocate : S.K. Mund and G.N. Mahapatra, for the Appellant; M.R. Mohanty, for the Respondent

Final Decision : Allowed

Judgement

V. Gopalaswamy, J.—This appeal is preferred against the judgment of the learned Additional Sessions Judge Balasore convicting the accused-Appellants under Sections 395, I.P.C and 457, I.P.C and sentencing them on the first count to undergo rigorous imprisonment for five years and on the second count to undergo rigorous imprisonment for three years with a direction that the sentences should run concurrently.

2. The gist of the prosecution case is that on the night of 23-5-1981 at village Chandamani (within Baliapal Police Station in Balasore district) seven culprits, including the present accused-Appellants, forcibly entered into the house of the informant by breaking open the door of the house and committing dacoity in his house carried away his cash, gold and silver ornaments etc., valued at Rs. 5,000/- and thereby rendered themselves liable under Sections 395, I.P.C. and 457, I.P.C.

3. Six accused persons, including the present Appellants, stood their trial before the Additional "Sessions Judge" under Sections 395 and 457, I.P.C the accused persons pleaded that as they objected to the informant's encroaching upon a

portion of the casuarina forest, the informant bore grudge against them and filed this false case against them. The Appellants had further taken the plea of alibi. In support of their plea, two defence witnesses were examined.

4. The trial Court, while acquitting accused Niasi, accused Gouranga and accused Jogendra of both the charges levelled against them, convicted and sentenced the present Appellants under the said two charges. So the evidence on record merits careful consideration to find out if the prosecution could successfully bring home to the Appellants the charges under Sections 395 and 457, I.P.C.

5. The prosecution has examined in all nine witnesses to prove its case. P.W. 6 is the informant and P.W. 7 is his daughter and P.W. 5 is his son and all the three of them are the only eyewitnesses to the alleged occurrence of dacoity. P.Ws. 1 to 4 are post-occurrence witnesses. P.Ws. 8 and 9 are the Investigating Officers in the case.

6. As P.Ws. 5, 6 and 7 are the only eye-witnesses to the alleged occurrence of dacoity, at the outset their evidence merits careful consideration.

The evidence of P.W. 6 shows that on the relevant night he was sleeping on the outer southern verandah of his house and his two daughters were sleeping by his side and his son was sleeping just outside the house on the eastern threshold of it. He stated that one chimney light was burning near his bed. While they were so sleeping, as there was flash of torchlight, his wife challenged as to who was focussing the torch and then as two dacoits came and caught hold of her, she raised an alarm when he woke up and then one of the dacoits caught hold of him and as he tried to free himself from him one of the other dacoits tied both his hands by a plastic rope and another dacoit gave a knife blow to his left forehead causing bleeding injury. It is in his evidence that two of the dacoits guarded him and he could recognise Appellant Laxman Mahanty to be one of them. He deposed that three of the dacoits brake open the door of his room and removed the articles and accused Jayaram and accused Kalia are the two dacoits" whom he could recognise from out of those three, dacoits. He stated that accused Jayaram Jena is the Sala (brother-in-law) of accused Gauranga Jena. His evidence shows that seven dacoits committed dacoity in his house. He deposed that on hearing the cry of his family members, his villagers Bhudev Patra, Bimal Patra, Subal Patra, Khagendra Biswal, Rajendra Jena and same .others came to his house and on their asking him whether he had recognised those dacoits, he told them that Kalia Jena, Laxman Mahanty, Kanhu Patra. Niasi Jena, Dibakar Jena were amongst those dacoits. He stated that accused Dibakar Jena is the son of Bhagaban Jena. From his evidence it is seen that he claims to have recognised same of the dacoits with the help of moonlight, chimneylight and flash of the torchlight. His evidence disclosed that an axe and a dhoti belonging to him, which went taken away "by the dacoits, were thrown at some distance from his house and the same were subsequently picked up by him and the villagers. He stated that as he made oral report on the next day morning at the Police Station, his report was recorded by the police and the same is marked as Ext. 2. He

stated that as accused Dibakar Jena pounced over his wife the time of dacoity, he had recognised him.

7. Admittedly, nothing came out of the alleged stolen articles was recovered from any of the Appellants. So for proving that the Appellants were involved in the alleged occurrence of dacoity, the prosecution relies on the evidence of P.Ws. 5, 6 and 7 identifying the Appellants to be amongst the culprits who took part in the occurrence of dacoity which took place on the relevant night. The evidence of P.W. 6 in chief-examination shows that he told his co-villagers, who came to his house, on hearing the alarm raised by his family members, that he was able to identify Kalia; Kanhu. Niasi and the Appellants to be amongst the culprits, who committed dacoity in his house. His evidence reads that he told the names of those six persons to his co-villagers who came to his house on the relevant night after the dacoits had fled away from his house. From the F.I.R. it is seen that according to the informant P.W. 6, in all seven persons took part in the occurrence of dacoity and out of them he was in a position to identify, three culprits namely son of Bhagaban Jena, brother-in-law of Gouranga. Jena and Laxman Mohanty, son of Jogendra Mohanty. In the F.I.R. P.W. 6 has specifically mentioned only the name of accused Laxman Mohanty and he has not specifically mentioned the name of any of the other culprits. The version of P.W. 6 in Court, that he was able to identify as many as six of the culprits, is contradicted by the version in the F.I.R. according to which he was in a position to identify only three of the culprits and the same is a material contradiction, which creates a serious doubt whether at all his evidence on the aspect of the identification of the culprits can be safely relied on.

8. P.W. 6 named P.Ws. 1 to 4 to be amongst the co-villagers who went to his house on the relevant night on hearing the alarm raised by his family members. The evidence of P.W. 1 shows that he came to know on the following morning that a dacoity was committed in the informant's house on the previous night when he went to the informant's house in the morning. So the evidence of P.W. 1 does not corroborate the version of P.W. 6 that P.W. 1 went to his house on the very night of occurrence on hearing the alarm raised by the inmates of his house. P.W. 1 stated that Bidyadhar (P.W. 6) told him that six to seven dacoits had entered his house and assaulted him and decamped with the booty. P.W. 1 does not state anything about P.W. 6 having told him that he was in a position to identify any of the culprits or about his having given the names of any of the culprits. So the evidence of P.W. 1 does not support the version of P.W. 6 that "he told his co-villagers that he was in a position to identify six of the culprits and gave their names before them. So the evidence of P.W. 1 seriously impeaches the credibility of P.W. 6 when he claims that he was in a position to identify six of the culprits including the three Appellants.

9. P.W. 2 has also stated that he went to the house of the informant on the following morning and his such statement contradicts the version of P.W. 6 that P.W. 2 rushed to his house on the relevant night hearing the alarm raised by the

inmates of his house. The evidence of P.W. 2 shows that the informant told him that he had identified the son of Jogendra Mohanty, son of Bhagaban Jena and brother-in-law of Gouranga some of the culprits, who had committed dacoity in his house. P.W. 2 categorically stated that he does not know as to who were the persons to whom the informant was referring to when he described them as the sons of Jogendra and Bhagaban and as the sala of Goutanga. So P.W. 2 also does not corroborate the version of P.W. 6 that he told P.W. 2 and his other co-villagers, that he was able to identify six of the culprits and clearly indicated their names before them.

10. The evidence of P.W. 3 shows that he went to the house of the informant on the very night on hearing the cries of the inmates of the house and then on his query, the informant told him that he could recognise four of the dacoits and they were son of Bhagaban jena. Jaya sala of Gouranga Jena, Laxman Mohanty and Kalicharan Jena. So the version of P.W. 3 that P.W. 6 told him that he recognised four of the dacoits, contradicts the version of P.W. 6 that he informed P.W. 3 and others that he could identify six of the dacoits. P.W. 3 stated that Bimal Patra, Abhilas Jena and P.W. 4 were also present at the time when P.W. 6 disclosed the names of some of the dacoits. But the said Bimal Patra and Abhilas Jena were not examined as witnesses on the side of the prosecution.

11. The evidence of P.W. 4 shows that on hearing the alarm, he went to the house of the informant on the night of occurrence when Bidyadhar told him the names of some dacoits whom he identified. P.W. 4 states that Jogendra Mohanty and his son, whose name he does not presently remember, are two of the dacoits, whose names P.W. 6 disclosed before him. So P.W. 4 also does not corroborate the version of P.W. 6 that he told P.W. 4 and the other co villagers that he was in a position to identify six of the culprits and gave their names before them. Jogendra Mohanty said to have been named by P.W. 6 as one of the culprits who was acquitted by the trial Court.

12. P.W. 5 is the son of P.W. 6 and they were of P.W. 6 and P.W. 7 is the daughter of P.W. 6 and they were the other inmates of the house at the time of occurrence. If P.W. 6 was in a position to identify as many as six of the culprits including the Appellants and stated about it before the other Villagers, P.Ws. 5 and 7 ought to have known about it. But P.Ws. 5 and 7 do not state in their evidence that their father had disclosed the names of the culprits before the villagers nor do they (P.Ws. 5 and 7) state as to how many of the culprits their father was in a position to identify. P.Ws. 1 to 4 were examined to corroborate the version of P.W. 6 on the aspect of the identification of the culprits. So according to the prosecution, P.Ws. 1 to 4 are material witnesses and so they must have been examined by the investigating Officer in the first instance. P.W. 8 is the Investigating Officer, who was in charge of the investigation of the case and claims to have gone to the spot of occurrence and examined some of the witnesses namely P.W. 6 and others but peculiarly enough admittedly he has not examined any of the witnesses P.Ws. 1 to 4. Even P.W. 9 who took charge of the

investigation of the case from P.W. 8. did not examine P.Ws. 1 and 2. The alleged occurrence was on the night of 23-5-1981 and P.W. 9 examined P.W. 3 on 26-5-1981. So the non-examination of P.Ws. 1 and 2 by any of the Investigating Officers is a suspicious feature of the prosecution case. Apart from the fact that P.Ws. 1 to 4 do not corroborate P.W. 6 regarding the identify of the culprits, their non-examination by P.W. 8 seriously impeaches the credibility of P.W. 6, when he claims to have stated before P.Ws. 1 to 4 and other co-villagers that he could identify six of the culprits including the present three Appellants, who took part in the occurrence of dacoity.

13. P.W. 5 is the son of the informant P.W. 6. The evidence of P.W. 5 shows that as he was sleeping, one of the dacoits pounced over him and as he tried to get up, the dacoit pressed him against the ground as he faced downwards. He deposed in his cross examination that he fell asleep when he was so pressed against the ground and he was lying with face downwards during the period he was, so pressed against the ground. It is in his evidence that somehow he managed to escape and run to, the village to call the villagers. In view of P.W. 5's own evidence that he was lying all the while with face downwards, there is no scope for him to identify any of the culprits. But still he (P.W. 5) claims to have identified accused Gouranga Jena, Jairam Jena and Kanhu as the culprits who took part in the occurrence of dacoity in his house. If really accused Gouranga Jena had pressed him (P.W. 5) against the ground as stated by him (P.W. 5), he (P.W. 5) would have stated about it before the Investigating Officer also. So his omission to state about it before the Investigating Officer is a material omission. Accused Gouranga Jena was acquitted by the trial Court. He claims to have identified the culprits in the moonlight. It is not his case that he knew any of the culprits before the date of occurrence. No test-identification parade was held regarding the identification of the culprits. So the evidence of P.W. 5 that he could identify Appellant Jairam as one of the culprits, cannot be relied on.

14. P.W. 7 is the daughter of P.W. 6. Her evidence shows that on the relevant night as he was sleeping one of the dacoits had suddenly trampled over her and then she woke up and as she was terrified, she concealed herself behind a cloth. When out of fear she concealed herself behind a cloth it is not very clear as to how she could identify any of the culprits. However, she claims to have identified accused Laxman and Jairam from amongst the seven culprits, who took part in the occurrence of dacoity. It is in her evidence that she was able to identify them with the help of the chimney light near the bed of her father and also because of the moonlight and the flashing of the torchlights. Admittedly she did not see accused Laxman Mohanty prior to the date of occurrence. There is nothing in the evidence of P.W. 7 to suggest that she had seen Jairam prior to the date of occurrence. She stated in her cross-examination that the chimney light was made dim at the time when they went to sleep P.W. 7 admits that she does not know the name of accused Laxman Mohanty even by the date of her deposition. The said admission materially contradicts the version of the informant that he could

identify Laxman Mohanty as one of the culprits and disclosed his name before the others on the relevant night. Admittedly, no test-identification parade was conducted for the identification of the culprits in the case. In view of the nature of the evidence of P.W. 7, her evidence in Court identifying accused Laxman and Jairam as the culprits who were amongst the dacoits who took part in the occurrence of dacoity, is wholly untrustworthy.

15. If really there was an occurrence of dacoity in the house of the informant and he was in a position to identify six of the culprits, he would have been very much anxious to contact the police as soon as possible, so that they would have helped him to recover the stolen properties. Though the occurrence took place at about 10 p. m. on the night of 23.5.1981, the informant reported about the occurrence at the Police Station only at 7 p. m. on 24-5-1981 and there is no explanation from the side of the prosecution for this delay in reporting about the Occurrence. P.W. 6 stated that one of the dacoits gave a knife blow to his left forehead causing a bleeding injury. P.Ws. 1 to 4 have also stated about their having seen a bleeding injury on the head of P.W. 6. The Investigating Officer (P.W. 8) does not state anything about his having seen a bleeding injury on the head of the informant in his chief examination. As the informant's sustaining a bleeding head injury at the hands of one of the dacoits is a material fact to prove the occurrence of dacoity, normally P.W. 8 was not expected to be silent about it in his chief-examination. In his cross-examination when the defence asked him (P.W. 8) about it, he stated that he found an injury on the head of the informant at the time of recording the F.I.R. He further stated that he gave a requisition for the medical examination of P.W. 6. 25-5-1981. The F.I.R. was recorded at about 7 p. m. on 24-5-1981. When the investigating Officer found the injury at that time it is not clear why the requisition was given on 25-5-1981 and not on 24-5-1981 itself after recording the F.I.R. On further cross-examination the Investigating Officer admitted that no medical requisition is available in the record and nothing has been mentioned in the case diary about his giving a requisition for the medical examination of P.W. 6. In a case of dacoity it is difficult to believe that if medical requisition was to be given for examining the informant the same could not be available in the record and that no mention about it would be made anywhere in the case diary. If P.W. 6 has sustained a bleeding head injury during the course of the occurrence, his clothes would have been stained with blood and the same would have been seized by the Investigating Officer. Hence, it is seen that there is no reliable evidence to show that P.W. 6 sustained a bleeding head injury during the course of the occurrence.

16. The evidence of the informant shows that the dacoits had thrown away his axe and his dhoti at some distance from his house and the same were picked up by him and the villagers. But none of the villagers was examined on the side of the prosecution to corroborate the above version of the informant. The informant's wife was the first person to challenge the dacoits when they focussed the torchlight and it was only after she raised an alarm saying, "DHAI ASA", P.W. 6 woke up as stated by him in his evidence. So the informant's wife is

a material witness in the case, and yet she was not examined as a witness on the side of the prosecution and there is no explanation from the side of the prosecution regarding her non-examination. In the facts of the present case her non-examination is also a factor which goes very much against the truth of the prosecution case. The Investigating Officer (P.W. 8) states that he seized a broken trunk and a broken key with Jock and another broken lock during the course of the investigation but none of these articles was produced in Court to be marked as a material object in the case. The defence has specifically suggested that there is no occurrence of dacoity in the house of the informant and the case was falsely "foisted against the accused persons as they objected to the informant's "unlawfully encroaching upon a portion of a casuarina forest. The informant admitted in cross-examination that when he was the headman of the village he encroached a portion of the casuarina forest and encroached it by fencing it and the said admission suggests that the defence plea that the case was foisted against them as they objected to such encroachment seems probable and true. Out of the six accused persons who stood their trial u/s 395, I.P.C., three of them were acquitted including accused Gouranga and accused Jogendra. The very fact that accused Gouranga, brother-in-law of Appellant Jairam and accused Jogendra father of Appellant Laxman were acquitted by the trial Court and they were roped in the case by the prosecution, is highly significant. From the above circumstances it is seen that even the prosecution version that there was an occurrence of dacoity in the house of the informant on the relevant night is not free from doubt.

17. Even if the findings of the trial Court against the present Appellants are upheld, the question still remains whether the order of conviction passed against the Appellants u/s 395, I.P.C. is legally sustainable. It is the consistent case of the prosecution that seven persons took part in the occurrence of dacoity which took place in the informant's house. Out of the Seven persons alleged to have been involved in the commission of dacoity in the informant's house six persons stood their trial and out of them three persons were acquitted by the trial Court. One of the essential ingredients of the offence u/s 395, I.P.C. is that five or more persons must have conjointly committed or attempted to commit robbery. So when according to the prosecution six named persons and another had conjointly committed robbery in the informant's house, but on a consideration of the evidence the trial Court acquitted three out of them of the charge u/s 395, I.P.C. none of the remaining four persons can be convicted of the offence u/s 395, I.P.C. *Ram Lakhan Vs. State of U.P.*, and *Padmanav Mohopatra v. State* 57(1984) C.L.T. 219). Hence in view of the findings of the trial Court acquitting three of the accused persons, the conviction of the present three Appellants u/s 395, I.P.C. is not maintainable in law and on that score also they are entitled to an acquittal of the charge u/s 395, I.P.C.

18. In view of the serious infirmities from which the prosecution evidence suffers, as pointed out earlier, there is no reliable evidence to show that any of the Appellants was involved in the commission of robbery in the informant's

house or was guilty of committing any other offence, Hence the Appellants are acquitted of the charges under Sections 395 and 457, I.P.C.

19. In the result, I hereby set aside the orders of conviction and sentence passed by the trial Court against the Appellants under Sections 395 and 457, I.P.C. and accordingly allow the appeal.

Appeal allowed.