
(2010) 10 P&H CK 0224

In the Punjab And Haryana At Chandigarh

Case No : Criminal Appeal No. 1296-SB of 2006

Shamshad @ Kala and Others

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision : 01-10-2010

Acts Referred:

Penal Code, 1860 (IPC) — Section 395, 397

Citation : (2011) 1 RCR(Criminal) 570

Hon'ble Judges : Jitendra Chauhan, J

Bench : Single Bench

Advocate : Sarfraz Hussain in C.R.A. Nos. 1296-SB and 87-SB of 2006 and C.R.A. No. 1713-SB of 2008 and Mr. Ashish Grover in Criminal Appeal No. 108-SB of 2006, for the Appellant; Mr. Kshitij Sharma, AAG, Haryana, for the Respondent

Final Decision : Allowed

Judgement

Jitendra Chauhan, J.—This judgment shall dispose of four appeals being Crl. Appeal Nos. 87-SB, 108-SB and 1296-SB of 2006 and Crl. Appeal No. 1713-SB of 2008 emanating from FIR No. 185 dated 30.4.2003 registered at Chandni Bagh, Panipat. It is, however, apt to mention here that first three above appeals have arisen out of a common judgment and order dated 5/7.12.2005 and the fourth one from judgment dated 22.8.2008 (for short "impugned judgments") passed by the Court of learned Additional Sessions Judge, Panipat, (for short "the Trial Court"). However, the facts are being taken from Crl. Appeal No. 1296-SB of 2006.

2. Vide its impugned judgment(s)/order dated 5/7.12.2005 and 22.8.2008, the learned Trial Court convicted all the accused/Appellants for the offences punishable under Sections 395 read with Section 397 of IPC and also further convicted accused/Appellants, namely, Shamsher, Shamshad @Kala and Mohsin u/s 25 of the Arms Act and sentenced all of them, except accused Subhash, to undergo rigorous imprisonment for a period of 10 years for the offence u/s 395

read with Section 397 of IPC and accused Shamsher, Shamshad @ Kala and Mohsin to undergo rigorous imprisonment for a period of two years for the offence u/s 25 of the Arms Act. Accused/Appellant Subhash was sentenced to undergo rigorous imprisonment for a period of seven years for the offence u/s 395 read with Section 397 of IPC.

3. Brief facts of the case as projected by the prosecution are that on 30.4.2003, SI Mahender Singh alongwith other police officials was present at Sanjay Chowk, Panipat in connection with patrolling duty when Ram Niwas, PW4, recorded his statement before him to the effect that he is resident of Panipat and is running a business of handloom export and running his factory in the name and style of "Bharat Overseas" located at Gohana Road. He further stated that this business is handled by his sons, namely, Vinod Goel, Vijay Goel and Varinder Goel. On 3.4.2003 around 12.30 p.m., his daughter-in-law Shiva Goel wife of Varinder Goel, reached at the factory premises by managing to escape from the house and told them that 5/6 armed persons have entered into their house and they have aimed the pistol at Shikshawati. Then complainant alongwith his son Varinder Goel and 2/3 workers reached their house and noticed that many persons were standing outside their house and womenfolk of the house were standing in a very feared manner. The complainant further stated that the accused persons had caused injuries on his wife and blood was also lying on the floor. The accused had taken away the jewellery and cash. He further deposed that at the time of said incident, his servant Sanjaesh, Ram Bahadur and one electrician Ramesh were inside the house. On the basis of this statement, formal FIR was registered and investigation was initiated. On 7.5.2003, Varinder Goel, son of Ram Niwas, the complainant, informed Inspector Baldev, PW21, that he received a telephonic message that the alleged dacoity, which was committed on 30.4.2003, was committed by accused Mohsin, Shamshad @ Kala and others and the informer further informed that if the raid is conducted then the accused persons could be apprehended and stolen goods may also be recovered. All the accused were arrested.

4. The accused/Appellants were charge-sheeted for the offence punishable under Sections 395/397 of IPC. The accused/Appellants Shamsher, Mohsin and Shamshad @ Kala was charge-sheeted for the offence u/s 25 of the Arms Act also. The accused pleaded not guilty and claimed trial.

5. To prove its case, the prosecution examined as many as 21 witnesses, namely, ASI Rajbir Singh as PW-1; SI Mohinder Singh as PW-2; Constable Dharambir as PW-3; Ram Niwas (complainant) as PW-4; Shiva Goel, wife of Varinder Goel, as PW-5; Rama, wife of Vinod Goel as PW-6; ASI Bachan Singhas PW-7; SI Chatar Singh, CIA Staff as PW-8; ASI Ranjit Kumar as PW9; SI Dharam Pal as PW-10; HC Mehar Singh as PW-11; SI Rattan Singh as PW-12; HC Rattan Singh as PW13; Inspector Ram Phal as PW-14; Constable Jagbir Singh as PW15; Jagdish Singh, Reader as PW-16; HC Surinder Singh as PW-17; ASI Rajinder Singh as PW-18; Radha Goel, wife of Vijay Goel as PW-20 and Inspector Balram, SHO as

PW-21.

6. PW2 SI Mohinder Singh, Police Station, Chandni Bagh, Panipat has recorded the statement of complainant Ram Niwas, PW4. He deposed that at about 1.10. p.m. when he visited the place of occurrence at that time about 100/150 persons were present at the place of occurrence.

7. PW4-Ram Niwas (complainant) reiterated the earlier version given at the time he made the complaint.

8. PW5-Shiva Goel, wife of Varinder Goel, had deposed that after unbolting the door of the room being used as temple, she managed to escape from the house. She further deposed when she left her house, on the way, she met two persons, namely, Dalip and another person not named, who took her to the factory premises on scooter.

9. PW-8-SI Chatar Singh, CIA Staff, Faridabad deposed that on receipt of a secret information on 15.5.2003, he apprehended the accused/Appellant Shamsher.

10. Inspector Balram, PW-21, SHO, Sector-5, Panchkula deposed that Varinder Goel, son of the complainant, informed him that he received a telephonic call from an informer, who told him that a dacoity in their house has been committed by Mohsin, Shamshad @ Kala and others. He also produced before him an identity card belonging to accused Shamsher. He recorded the statement of Varinder Goel and on the basis of which, Section 395 of IPC was added to the FIR. On the basis of this information, he constituted a raiding party including Sanjaesh (servant of the complainant), Varinder Goel and other police officials and went to Servat Nagar in District Muzaffar Nagar City in search of the aforesaid persons. He further deposed that Sanjaesh (servant of the complainant) pointed out towards a person who was standing near the railway crossing along with 2-3 other boys, saying that he was the same person who had committed the dacoity. Thereafter he nabbed the said boy who was identified as Mohsin.

11. ASI Bachan Singh, PW7; ASI Ranjit Kumar, PW-9; SI Dharampal, PW-10; SI Rattan Singh as PW-12; SI Ram Phal as PW-14 and ASI Rajinder Kumar, PW-18, who are also the investigating officers in the present case, are material witnesses.

12. The evidence of remaining witnesses is of formal nature.

13. After completion of prosecution evidence, the accused-Appellants were examined by putting all the incriminating circumstances appearing against them in the prosecution evidence u/s 313 of the Code of Criminal Procedure to which they denied and claimed to be innocent. In defence, they examined Balram son of Kashmiri Lal as DW1; Mohinder Singh son of Preet Singh as DW-2 and Sant Lal as DW-3.

14. After hearing the learned Counsel for the parties, the learned trial Court

convicted and sentenced the accused/Appellants for the offence and the term as noticed in para No. 2 of this judgment.

15. Feeling aggrieved by the judgment and order of the learned Trial Court, the Appellants have preferred four different appeals as reflected in para 1 of this judgment.

16. Mr. Sarfraz Hussain, Advocate, learned Counsel for the Appellants, namely, Shamshad @ Kala and others, Mohsin and Shamsheer, has argued that the story put-forth by the prosecution is highly improbable. As per prosecution case, Shiva Goel, PW-5, was helped by Dalip and another person, who dropped her to the factory premises on a scooter at the time of her escape when the alleged dacoity was going on. However, neither the statement of said Dalip nor the statement of second person, who allegedly took her on scooter was recorded during investigation. It has further been argued that Shiva Goel, PW-5, did not tell about this incident to any of the neighbours. Even as per the statement of complainant-Ram Niwas, PW-4, many persons had gathered at his house. However, neither the statement of any of them was recorded nor any of the neighbour has been cited as witness.

17. It has further been argued that as per prosecution case, at the time of dacoity, Shikshawati, wife of the complainant, Ram Niwas, PW-4 was given head injury. The blood oozed out and spread on the floor. But surprisingly, no MLR of Shikshawati or any medical record has been brought in evidence.

18. The learned Counsel for the Appellants has further argued that at the time of alleged dacoity, one electrician was stated to be working in the house. But the said electrician has also not been cited as witness.

19. It is further argued that when Shiva Goel reached at the factory premises and told the factum of dacoity at house to the complainant, no telephonic information was supplied/given by the complainant to the police. This action of the complainant is highly unnatural and improbable. Thus, the learned Counsel has argued that the complainant consumed this time for manipulating the story as reflected in the FIR.

20. The learned Counsel has further argued that from the statement of Inspector Balram, SHO, PW-21, Varinder Goel informed the police that he received a telephonic call that the accused/Appellants Mohsin, Shamshad @Kala etc. had committed dacoity. But no record from the Telephone Department in this regard was produced in evidence. It has also come in the statement of Inspector Balram, PW21, that Varinder Goel, had given identity card of Appellant Shamsheer on 7.5.2003. However, this stand is falsified from the statement of S.I. Mohinder Singh, PW2, who was the first to visit the place of occurrence and has deposed that no such identity card was recovered.

21. It has further been argued that Sanjesh and servants of the complainant, who were allegedly present in the home at the time of alleged incident, were also

not examined.

22. Learned Counsel has further argued that no identification parade was carried out in the instant case. The accused were identified for the first time in the Court, which has no evidentiary value in the eyes of law. It has also been argued that the recovery of alleged ornaments has been foisted upon the Appellants, as from the evidence on record, it is established that the alleged recovery is in fact no recovery and the Appellants have been framed in the instant case because one of the Appellants, i.e., Shamshad had worked as a carpenter in the house of complainant and perhaps the complainant and his family were inimical towards him for some reason, known to them.

23. Learned Counsel has pointed out that the alleged recovery is falsified from the fact that no list of ornaments finds mentioned in the FIR. This fact is further established from the statements of ladies recorded u/s 161 Code of Criminal Procedure in which they did not disclose the details viz number, designs, distinguishable mark etc. of their jewellery. The proper procedure as per law was also not followed at the time of effecting alleged recovery.

24. It has further been argued that no independent witness was joined either at the time of the arrest or at the time of effective recovery. This fact proves that the Appellants were falsely implicated in the present case.

25. It is further argued that in the cross-examination of Rama, wife of Vinod Goel, PW-6, it has come on record that finger prints were lifted from their house. However, no Finger Prints Expert was examined and from this, it is apparent that in fact no such incident in fact ever took place.

26. Mr. Ashish Grover, Advocate, learned Counsel for the Appellant namely Subhash, has argued that fact of arrest of Appellant Subhash Chand on 13.5.2003 was not proved. ASI Ranjit Singh, PW-9, has stated that when he alongwith H.C. Mehar Singh, PW-11 and Constable Partap Singh was present near Hotel Gold, Panipat, Balram-DW1, produced the accused/Appellant Subhash Chand before him and one gold necklace was recovered from his pocket. But the said Balram, DW1 has not supported the case of prosecution. Balram, DW1, has stated that he never produced Appellant Subhash before ASI Ranjit Singh, PW-9. Thus, the prosecution has failed to prove the arrest of Appellant Subhash.

27. On the other hand, learned Counsel for the State has argued that heavy recovery of ornaments was effected in the instant case. The prosecution has no motive to falsely implicate the Appellants. The accused/Appellants were identified by Shiva Goel. Therefore, the case of the prosecution is fully established.

28. I have heard the learned Counsel for the parties and perused the record with their able assistance.

29. This is the admitted case of the prosecution that Shiva Goel PW-5, who allegedly succeeded in making exit from the house, in which the alleged dacoity was being committed, on the way to the factory premises met two persons,

namely Dalip and another person (not named) by her. The second person who is not named allegedly dropped her on his scooter to the premises of the factory being run by the complainant's family. However, neither the statement of Dalip nor the statement of alleged second person, who dropped her to the factory premises on scooter, was recorded nor they were cited as witnesses.

30. It is further the case of prosecution that the wife of the complainant Shikshawati was given head injury by the intruders and blood was oozing out which had spread on the floor. However, no MLR with regard to the injury suffered by Shikshawati has come on record. The said Shikshawati was not examined by the prosecution during trial being unnecessary witness. Neither any blood stained earth was lifted from the spot. There is nothing on record as to who treated the injured Shikshawati.

31. It is also an admitted case of the prosecution that one electrician was working in the house of complainant at the time of alleged dacoity. However, he has also not been cited as witness.

32. As per the statement of Inspector Balram, SHO, PW-21, Varinder Goel informed the police that he received a telephonic call that the accused/Appellants Mohsin, Shamshad @ Kala etc. had committed dacoity. Moreover, there is further contradiction with regard to handing over of identity card of the Appellant Shamsher on 7.5.2003. Similarly, no record from the Telephone Department was produced in evidence. It has also come in the statement of Inspector Balram, PW21, that Varinder Goel had given I.D. Card of Appellant Shamsher on 7.5.2003. However, this fact stands falsified from the statement of S.I. Mohinder Singh, PW-2, who first visited the place of occurrence and no such identity card was recovered by him.

33. As per the statement of Inspector Ram Phal, PW-14, the accused/Appellant Mohsin was arrested from Sarbat Nagar in District Muzafarnagar by Inspector Balram Singh on the identification of a child named Sanjaesh, who is the servant of the complainant and accompanied the raiding team alongwith Varinder Goyal. This witness has admitted that the ornaments recovered by them were identified by Varinder Goel and no other family members had identified the ornaments. However, neither the above said Sanjaesh on whose identification, the accused Mohsin was arrested nor Varinder Goel was examined. Nor, there is any proof on record that Sanjaesh and Varinder Goel had accompanied the investigating team to Uttar Pradesh. Therefore, due to non-examination of these two material witnesses, the story of arrest put-forth by the prosecution does not inspire any confidence and explanation has been rendered by prosecution in this behalf.

34. The accused were identified for the first time in the court. No identification parade was carried out. Hon''ble the Supreme Court in Kanan and Others Vs. State of Kerala, , has held that where a witness identified an accused who is not known to him in the Court for the first time his evidence is absolutely valueless unless there has been a previous T.I. parade to test his powers of observations.

The idea of holding T.I. parade u/s 9 is to test the veracity of the witness on the question of capability to identify an unknown person whom the witness may have seen only once. If no T.I. parade is held that it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court.

35. Another aspect that needs to be examined is the conduct of the complainant. Shiva Goel, PW-5, reached the factory premises and joined her father-in-law, the complainant. However, he did not make any effort to immediately inform the police telephonically or by any other means. This conduct of the complainant is not natural, particularly when the complainant is a very affluent person and has access to all these facilities coupled with the fact that when he reached his house many persons had gathered there. However, no statement of any neighbour in support of the case of the prosecution was recorded. All these facts if taken together, cast a serious doubt on the veracity and truthfulness of the prosecution version.

36. In this view of the matter, the case of the prosecution mainly hinges on the recovery allegedly effected from the Appellants. However, the manner in which the recovery was effected makes the case of prosecution further doubtful. As per procedure required under law, the recovered articles are to be mixed up with other articles and thereafter, the person concerned is asked to recognize his/her articles. However, this established procedure was not followed by the prosecution in the instant case. It is relevant to mention that the alleged recovered articles were identified by only Varinder Goel, husband of Shiva Goel, PW-5. The said Varinder Goel has not been examined coupled with the fact that he was a member of the raiding party when accused Mohsin was allegedly arrested and recovery was effected from him. His non-examination is fatal to the case of prosecution, which renders entire case of the prosecution doubtful. Otherwise also, it is highly improbable that a male member of the family would be in a position to identify the jewellery of other women folk in the family particularly when the number of ornaments is sufficiently large. It is also relevant to notice that details of ornaments have not been mentioned by the complainant in his statement initially got recorded, on the basis of which FIR was lodged.

37. The ornaments were identified by the women folk of the complainant party for the first time in the court. However, from the statement of complainant, it is inferred that he had taken the ornaments on supadari, and this fact stands admitted by Radha Goel, PW-20, in her cross-examination. Therefore, in my considered opinion, this identification is of no consequence.

38. Another aspect which requires consideration is that from the statement of Rama, PW6, it has come on record that the finger prints were collected from the spot but no finger print expert was examined. As the accused were arrested and finger prints would have been a clincher in the instant case. However, there is no explanation to the fact as to why no finger print expert was examined.

39. The arrest of Appellant Subhash Chand on 13.5.2003 is not proved. ASI Ranjit Singh, PW9, has stated that when he alongwith H.C. Mehar Singh, PW11 and Constable Partap Singh were present near Hotel Gold, Panipat, then Balram, DW1 produced before him the accused/Appellant Subhash Chand. This is in contradiction with the statement of Balram DW-1, who has categorically stated that he did not produce Subhash Chand before police. Thus, the prosecution has failed to prove the date of arrest of Appellant Subhash, which further makes the case of the prosecution doubtful.

40. A cumulative reading and appreciation of the facts (i) non examination of Dalip Singh and another person who allegedly met Shiva Goel took her on his scooter to the factory premises of her father-in-law (ii) non-furnishing of any medical proof with regard to the injury suffered by Shikshawati (iii) non-lifting of blood stained earth from the spot; (iv) nonsharing of alleged occurrence with the neighbours; (v) non-joining of any neighbourer in the investigation; (vi) non-examination of Shikha Goel; (vii) non-examination of electrician, who was present at the time of alleged dacoity; (viii) non- examination of servant Sanjaesh on whose identification accused Mohsin was arrested; (ix) non-examination of Varinder Goel, who identified the jewellery in the absence of any particular mark coupled with the fact that he was a member of the raiding party, make the case of the prosecution totally doubtful.

41. As far as recovery of pistols is concerned, the same were recovered from the open space and no independent witness was joined at the time of said recovery and the same were found to be not used in the crime. Therefore, this recovery is of no consequence and accordingly, no case is made out u/s 25 of the Arms Act against the Appellants.

42. In the circumstances, I am of the considered opinion that prosecution has suppressed the true genesis of the crime and the best evidence has been withheld from the Court.

43. For the reasons mentioned above, all the four appeals are allowed. The impugned judgments/order dated 5/7.12.2005 and 22.8.2008 passed by the learned Trial Court are set aside. The Appellants are stated to be on bail. Their bail bonds shall stand discharged.