
(2009) 03 UK CK 0044

In the Uttarakhand High Court

Case No : Criminal Appeal No. 557 of 2001

Vijay Thapliyal and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 26-03-2009

Acts Referred:

Arms Act, 1959 — Section 25, 25(4)

Criminal Procedure Code, 1973 (CrPC) — Section 207, 313, 374(2)

Penal Code, 1860 (IPC) — Section 391, 399, 402

Citation : (2010) 1 NCC 87 : (2009) 2 UC 1318

Hon'ble Judges : Dharam Veer, J

Bench : Single Bench

Advocate : Rajendra Kotiyal, for the Appellant; M.A. Khan, Brief Holder, for the Respondent

Final Decision : Allowed

Judgement

Dharam Veer, J.—This appeal, preferred by the Appellants u/s 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as Code of Criminal Procedure), is directed against the judgment and order dated 20.5.1992 passed by the II Additional Sessions Judge, Dehradun in Sessions Trial No. 91/87, State v. Yogendra Singh & 4 Others; Sessions Trial No. 93/87, State v. Rajvardhan; Sessions Trial No. 92/87, State v. Vijay Thapliyal and Sessions Trial No. 94/87, State v. Rajendra @ Raju. By the aforesaid judgment and order dated 20.5.1992, the Learned II Additional Sessions Judge has convicted the Appellants-accused Vijay Thapliyal, Rajvardhan Singh Bhandari and Rajendra Singh @ Raju u/s 399 of Indian Penal Code, 1860 (for short, I.P.C.) and sentenced each of them to undergo five years" R.I. They were further convicted u/s 402 I.P.C. and sentenced to undergo five years" R.I. The Appellants-accused Vijay Thapliyal and Rajvardhan Singh Bhandari have also been convicted u/s 25 of The Arms Act, 1959 (for short, the Act) and both of them have been sentenced to undergo two years" R.I. It has further been directed that all the sentences shall run concurrently. The Appellant-accused Rajendra Singh @ Raju was not found guilty

u/s 25(4) of the Act and has been acquitted of the said charge by the trial court.

2. In brief, the prosecution case is that on 29.12.1986 at about 11.30 PM, on the information of Mukhbir that some persons would assemble in the hut of Shaym Bahadur @ Pahalwan behind Hem Kund Gurudwara in Rishikesh to commit dacoity in the house of one Mr. Bansal near the petrol pump, Ghananand Sharma, the S.H.O./Inspector In-charge, Rishikesh Police Station, made a police team consisting of S.I. Bhullan Singh Sharma, S.I. Rajendra Singh Tomar, S.I. Srinivas Sharma, S.I. Sureshanand Sharma, S.I. Shoveer Singh, S.I. Rajvardhan Gaur, S.I. Anjur KumarTyagi, S.I. M.R. Dugtal, Head Constable Kuwar Singh, Constable Jai Kumar, Constable Sukhveer Singh, Constable Harendra Singh, Constable Tilak Singh, Constable Dharam Pal Singh, Constable Rajendra Prasad and Constable Tilak Ram. The said police team armed with weapons moved from the police station along with the Mukhbir at 11.40 PM. In their way to the place of occurrence, they tried to find the public witnesses, but no one was ready to accompany the police party. The said police party reached near the hut of Shyam Bahadur at about 12 in the night.

3. Thereafter the police party was divided into two groups. S.I. Bhullan Singh Sharma led the first group, whereas S.I. Srinivas Sharma led the second group. The first group took position from the north side of the hut towards the sugarcane field, while the second group positioned itself from the west-south side under the wall at about 12.20 AM. After 20 minutes, four dacoits arrived 3 inside the hut and started talking to each other. One of them stated that Jassu Netaji has still not arrived. After two minutes, two more dacoits also arrived there. One of the dacoits uttered that first of all they will commit dacoity in the house of Bansal near the petrol pump. Thereafter they will commit dacoity in the nearby houses. After hearing the talks, the police party challenged the dacoits and asked them to surrender as they have been encircled by the police. Then the police fired two rounds of VLP. On that, all the six dacoits left the hut and ran towards the eastern side. Police party chased the dacoits and arrested four of them at about 1 AM, while two dacoits were successful in escaping from the place of occurrence.

4. Out of four arrested dacoits as mentioned above, one named himself as Vijay Thapliyal from whose possession one country-made pistol of 315 bore and two live cartridges were recovered. Second dacoit identified himself as Rajvardhan Singh Bhandari from whose possession one country-made pistol of 303 bore and two live cartridges were recovered. Third dacoit told his name as Rajendra Singh @ Raju and one knife was recovered from him. From the possession of fourth dacoit, who identified himself as Balwant Singh Patwal, one khukhri was recovered. Recovery memo was prepared in the light of the torch by S.I. Sureshanand Sharma and recovered items were sealed separately on the spot. Specimen of seal were prepared. None of the accused was able to show the license of the weapons recovered from their possession. The names of two persons, who fled the spot, were told as Yogendra Singh Panwar and Jasbir @

Jassu (acquitted by the trial court). Recovery memo Ex. Ka-1 prepared on the spot was signed by the policemen. Fard baramadgi khokha of VLP Ex. Ka-2 was also prepared on the spot. Specimen of seal Ex. Ka-3, Ka-4, Ka-5, Ka-6 and Ka-7 4 were also prepared on the spot. Thereafter all the four arrested persons were made Baparda on the spot.

5. On the basis of the aforesaid recovery memo Ex. Ka-1, an FIR was lodged by S.I. Bhullan Singh Sharma, PW-1 in the police station Rishikesh on 30.12.1986 at 4 AM. The chick FIR was prepared by Constable Clerk Tilak Ram. That chick FIR is Ex. Ka-13. Necessary entry was also made in the GD. Carbon copy of GD is Ex. Ka-14. The investigation of this case was initially entrusted to Sri Ghananand Sharma, Inspector In-charge of the said police station. Later on the investigation was handed over to S.I. Rajendra Singh Dhama, PW-4.

6. During the course of investigation, the S.O. has inspected the place of occurrence and prepared the site plan Ex. Ka-8. The I.O., during the course of investigation, also applied for sanction to prosecute the Appellants-accused Vijay Thapliyal and Rajvardhan Bhandari u/s 25 of the Act and the sanction was accorded by Sri Ashok Khurana, the then District Magistrate, Dehradun vide sanction orders Ex. Ka-15 and Ka-16 respectively. During the course of investigation, the co-accused Jasbir @ Jassu (acquitted by the trial court) was identified in the District Jail, Dehradun and identification memo Ex. Ka-21 was prepared. The I.O. recorded the statement of the witnesses during the course of investigation and after completing the investigation filed the chargesheet against the Appellants-accused and the co-accused Balwant Singh Patwal and Yogendra Singh Panwar u/s 399/402 I.P.C. The said chargesheet is Ex. Ka-11. Chargesheet u/s 399/402 I.P.C. Ex. Ka-12 was filed against the co-accused Jasbir @ Jassu (acquitted by the trial court). Chargesheets Ex. Ka-17, Ka-18 and Ka-19 u/s 25 of the Act was filed against the 5 Appellants-accused Vijay Thapliyal, Rajvardhan Singh Bhandari and Rajendra Singh @ Raju respectively.

7. Learned Additional Chief Judicial Magistrate, Dehradun, after giving the necessary copies of the documents to the Appellants-accused and the co-accused as prescribed u/s 207 Code of Criminal Procedure, committed the case to the Court of Sessions on 15.7.1987. The case was transferred to II Additional Sessions Judge for its disposal according to law.

8. Learned II Additional Sessions Judge framed the charges against the Appellants-accused and the co-accused u/s 399 & 402 of I.P.C. The charges u/s 25 of the Act were also framed against the Appellants-accused. The charges were read over and explained to each of the Appellants-accused and the co-accused, who pleaded not guilty and claimed to be tried.

9. To prove its case, the prosecution has examined PW-1 S.I. Bhullan Singh; PW-2 S.I. Anuj Kumar Tyagi; PW-3 S.I. Srinivas Sharma and PW-4 Rajendra Singh Dhama, the I.O. of the case.

10. Thereafter, statement of each of the Appellants-accused and co-accused,

except Balwant Singh Patwal, were recorded u/s 313 of Code of Criminal Procedure. The oral and documentary evidence were put to the Appellants-accused and the other co-accused, except Balwant Singh Patwal, in question form, who denied the allegations made against them and stated that they have been falsely implicated in the case. In defence, they did not produce any documentary or oral evidence on record. However, certain documents were filed on behalf of co-accused Yogendra Singh Panwar and Jasbir @ Jassu (acquitted by the trial court). Accused Balwant Singh Patwal is absconding since the trial and could not be arrested thereafter.

11. After hearing Learned Counsel for the parties and appreciating the evidence on record, the Learned II Additional Sessions Judge, Dehradun vide his judgment and order dated 20.5.1992 convicted and sentenced to the Appellants-accused as discussed above. Against the aforesaid judgment and order dated 20.5.1992, the Appellants-accused have preferred the present appeal.

12. I have heard Learned Counsel for the parties and have carefully perused the entire material available on the record.

13. To prove its case, the prosecution has examined the PW-1 Bhullan Singh, who has stated that in the month of December, 1986 he was posted as S.I. in the Rishikesh police station. On 29.12.1986 at about 11.30 PM, Inspector In-charge of the said police station received an information from the Mukhbir that 6-7 dacoits will assemble in the hut of Shyam Bahadur in the night for the purpose of committing dacoity in the city. Hence, Inspector In-charge, Ghananand Sharma instructed the policemen to reach at the spot. Thereafter at 11.40 PM, this witness along with other policemen armed with weapons reached near the hut of Shyam Bahadur near the Gurudwara. In their way, the police party unsuccessfully tried to search the public witness. This witness inspected the hut along with the Mukhbir and rest of the police personnel were left at some distance from the hut. Thereafter Mukhbir left the place of occurrence. Police party was divided into two groups. The password "Gulab" was told to the police team. At around 12.20 AM, the first group under him took position from the north side of the hut and the second group under S.I. Simivas Sharma (PW-3) positioned itself from the south-west side of the hut. Nearly 20 minutes thereafter, four dacoits came inside the hut from the eastern side. One of them was heard as saying that Jassu Ustad has not come. Wait for the Netaji. Ten minutes thereafter two more dacoits came from the eastern side and sat in the hut. Then one of the dacoits uttered that they will first commit the dacoity in the house of Bansal near the petrol pump. On hearing this, he challenged the dacoits and asked them to surrender. Then he fired two rounds of VLP and under its light, six dacoits were seen to be running away towards the eastern side from the hut. Four of them including the Appellants-accused and the co-accused Balwant Singh Patwal were caught hold by the police party at the distance of 15 steps from the hut. Time was 1 AM. Two dacoits were successful in running away from the place of occurrence. One dacoit, namely, Yogendra Panwar was

identified in the light of V.L.P fire, whereas the name of second dacoit was not known to him but he stated that he could identify him as and when he would come before him.

14. This witness has further stated that all the four arrested dacoits were searched. One country-made pistol of 315 bore and two live cartridges were recovered from the possession of Vijay Thapliyal. One country-made pistol of 303 bore and two live cartridges were also recovered from the possession of Rajvardhan Singh Bhandari. A knife was recovered from Rajendra Singh @ Raju. From the possession of fourth dacoit, Balwant Singh Patwal, one khukhri was recovered. Fard was prepared in the light of the torch by S.I. Sureshanand Sharma on his dictation. Thereafter fard was signed by the police personnel as well as by the arrested accused. That fard is Ex. Ka-1. Thereafter arrested accused were made Baparda and were taken to the police station along with the recovered articles. Pistol recovered from Vijay Thapliyal is Ex. 1 and the live cartridges recovered from him are Ex. 2 & 3. The 8 pistol recovered from Rajvardhan Singh Bhandari is Ex, 4 and the two live cartridges recovered from him are Ex. 5 & 6. Knife recovered from Rajendra Singh @ Raju is Ex. 7. Khukhri recovered from Balwant Singh Patwal is Ex. 8. Two cartridges of VLP fire are Ex. 9 & 10. Specimen of seal are Ex. Ka-3 to Ka-7. The cloth under which the aforesaid articles were sealed are Ex. 11,12,13,14 & 15. The recovered articles were taken to the police station and the case was registered against the accused persons.

15. Statement of this witness PW-1 is corroborated by the deposition of PW-2 S.I. Anuj KumarTyagi and PW-3 S.I. Srinivas Sharma.

16. PW-4 is S.I. Rajendra Singh Dhama, who has stated that on 3.1.1987, he was entrusted with the investigation of this case and before that the investigation was being done by Ghananand Sharma, the SHO. During the course of investigation, he recorded the statement of the witnesses and prepared the site plan of the place of occurrence, which is Ex. Ka-8. Accused Jasbir @ Jassu and Yogendra Singh Panwar (acquitted by the trial court) were arrested on 12.1.1987 by S.I. Srinivas Sharma. After completing the investigation, he filed the chargesheet against the accused persons, which is Ex. Ka-11. The chargesheet filed against the co-accused Jasbir @ Jassu (acquitted by the trial court) is Ex. Ka-12. He has further stated that the chick FIR Ex. Ka-13 was prepared by Constable Tslak Ram. Necessary entries were made in the GD and the carbon copy of the GD is Ex. Ka-14.

17. After that, the statement of the Appellants-accused an the co-accused, except Balwant Singh Patwal, were recorded u/s 313 of Code of Criminal Procedure The oral and documentary evidence were put to the aforesaid Appellants-accused and the co-accused in question form, 9 who denied the allegations made against them and stated that they have been falsely implicated in the case. In defence, they did not produce any documentary or oral evidence on record. However, the Appellants-accused Vijay Thapliyal and Rajvardhan

Singh Bhandari have stated that the police had arrested them on 25.12.1986 from Rani Pokhari while the Appellant-accused Rajendra Singh @ Raju has stated that he was arrested by the police on 25.12.1986 from his house. The co-accused Yogendra Panwar and Jasbir @ Jassu (acquitted by the trial court) have also stated that they were arrested by the police on 25.12.1986 from Rani Pokhari.

18. Learned Counsel for the Appellants Sri Rajendra Kotiyai has argued before the Court that co-accused Yogendra Singh Panwar and Jasbir @ Jassu have been acquitted by the trial court on the same set of evidence, whereas Appellants-accused have been convicted and sentenced as discussed above. Therefore, Learned Counsel has argued that the Appellants-accused are also entitled to get the benefit of acquittal and they cannot be convicted on the same set of evidence on which two other co-accused have been acquitted. Reliance has been placed on the judgment delivered by the Hon'ble Apex Court in the case of Deepak Rajak v. State of West Bengal reported in AIR 2007 SOW 5740. Paras 3, 5, 6 and 7 of this authority are relevant and the same are reproduced as under:

3. Learned Counsel for the Appellant placed reliance on various decisions of this Court contending that the benefit of acquittal should be extended to the Appellant.

5. The position in law as to what happens in case of acquittal of similarly placed co-accused on the same set of facts and on similar accusations has been considered by this Court in several cases.

6. A departure may be made in cases where the accused had not surrendered after the conviction in addition to not filing an appeal against the conviction. But as in the present case, after surrender, the benefit of acquittal in the case of co-accused on similar accusations can be extended.

7. The appeal is allowed and conviction and sentence as recorded by the trial court and upheld by the High Court is set aside.

19. I find substance in the argument of the Learned Counsel for the Appellants-accused. In the statement of PW-1 S.I. Bhullan Sharma, PW-2 S.I. Anuj Kumar Tyagi and PW-3 S.I. Srinivas Sharma, it has come that the Appellants-accused were arrested on the spot along with co-accused Balwant Singh Patwal (absconding). Two co-accused, viz., Yogendra Singh Panwar and Jasbir @ Jassu ran away from the spot. Later on police have shown their arrest on 12.1.1987 but the trial court has acquitted them on the basis of the statement recorded u/s 313 Code of Criminal Procedure, wherein they have stated that they were arrested by the police on 25.12.1986 from Rani Pokhari. Appellants-accused gave the same statement u/s 313 Code of Criminal Procedure that they were arrested on 25.12.1986. But the statement of the Appellants-accused were disbelieved by the trial court on the ground that no telegram in respect of their arrest was sent on behalf of them to the higher authorities, whereas in the case of co-accused Yogendra Singh Panwar and Jasbir @ Jassu, the telegram was sent to the higher

authorities that they have been illegally detained by the police at the Rishikesh police station since 25.12.1986. In my considered opinion, this distinction does not debar the Appellants-accused to get the benefit of acquittal which has been given to the other co-accused by the trial court. Furthermore, the facts and circumstances of the case belie the whole prosecution story and the same appears to be concocted one. Therefore, the reasons recorded by the trial court to convict the Appellants-accused are not justified 11 and reasonable and the Appellants-accused are also entitled to get the benefit of acquittal.

20. Learned Counsel for the Appellants-accused invited my attention towards Section 391, 399 and 402 of I.P.C. For the sake of convenience, the same are reproduced as under:

391. **Dacoity.**-When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

399. **Making preparation to commit dacoity.**-Whoever makes, any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

402. **Assembling for purpose of committing dacoity.**-Whoever, at anytime after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

21. Learned Counsel for the Appellants-accused has further argued that as per the provisions contained u/s 391 I.P.C, when five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity"- He has further submitted that out of six accused, two persons have been acquitted by the trial court holding that they were not present on the place of occurrence. One co-accused Balwant Singh Patwal is 12 absconding since the trial. Therefore, remaining three persons i.e. Appellants do not come under the purview of the definition of "dacoity" as given u/s 391 I.P.C. Hence, on this very ground, the Appellants-accused are not liable for conviction u/s 399/402 I.P.C. I find substance in the argument of Learned Counsel for the Appellants-accused inasmuch as the mandatory ingredients of Section 391 are not attracted in the present case. As the trial court has acquitted two persons holding that they were not present on the place of occurrence, hence the remaining three persons will not fall under the definition of "dacoity". Therefore, alleged recovery of weapons from the Appellants-accused is also developed one. My view is further fortified from the factum that the weapons shown to be recovered from the Appellants-

accused were never produced before the trial court on any date. If the alleged weapons were recovered from the possession of Appellants-accused, then they should have been produced before the trial court at the time of evidence in order to prove the recovery. These facts render the whole prosecution story as doubtful. As such, the prosecution has failed to prove its case against the Appellants-accused beyond reasonable doubt and the Appellants-accused are entitled to get the benefit of doubt.

22. Thus, for the reasons recorded above and in view of the settled legal position discussed supra, the prosecution has not proved the case against the Appellants-accused beyond reasonable doubt and the Appellants-accused are entitled to get the benefit of doubt. Therefore, the impugned judgment and order dated 20.5.1992 of the trial court is incorrect and unjustified and is liable to be set aside.

23. Accordingly, the appeal is allowed. The judgment and order dated 20.5.1992 passed by the II Additional 13 Sessions Judge, Dehradun convicting the Appellants u/s 399/402 of I.P.C. and Section 25 of the Arms Act is hereby quashed and the sentence of five years" R.I. each u/s 399 and 402 of I.P.C. awarded to Appellants Vijay Thapliyal, Rajvardhan Singh Bhandari and Rajendra Singh @ Raju and two years" R.I. u/s 25 of the Arms Act awarded to Appellants Vijay Thapliyal and Rajvardhan Singh Bhandari, which were directed to run concurrently, is also set aside. The Appellants are on bail. They need not surrender. Their bail bonds are cancelled. Sureties are discharged.

24. Let the lower court record be sent back.