
(1999) 07 AHC CK 0184
In the Allahabad High Court
Case No : Criminal Appeal No. 2007 of 1995

Virendra Singh (In Jail)

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 05-07-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313

Evidence Act, 1872 — Section 6

Penal Code, 1860 (IPC) — Section 147, 323, 325, 395

Citation : (1999) CriLJ 4645

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : G.C. Saxena, L. Dobhal and Rajendra Dobhal, for the Appellant;
A.G.A., for the Respondent

Judgement

B.K. Sharma, J.—This is an appeal against the judgment and order dated 7-12-1995 passed by Sri R.P. Singh, the then Sessions Judge, Tehri Garhwal in S.T. No. 41 of 1991 State v. Virendra Singh, whereby he convicted the accused-appellant of the offence u/s 395, 1.P.C. and sentenced him to undergo R.I. for a period of 7 years-and to pay a fine of Rs. 2000/- and in default of payment of fine to suffer R.I. for a further period of 6 months.

2. The prosecution case was that on 7-1 -1991 at about 8.15 p.m. the first informant Madan Singh Kundra (PW 1), who was posted as Tehsildar, Tehri came back to Tehri after leaving Sub-Divisional Magistrate at his residence after attending the law and order duty at top Terrace with Sub-Divisional Magistrate, Tehri. He came to his residence situated at Mohalla Chanakhet, Tehri along with his peon Amichand Ramola. He noticed the presence of 5-6 boys at the gate of his house and they were hurling abuses and grappling with each other and they appeared to be as under the influence of liquor. Sri Madan Singh Kundra asked these boys not to do so but they caught hold of him and started beating him. On the alarm being raised by Sri Madan Singh Kundra, his wife Smt. Madhu Kundra (P. W. 2) and his daughter Manju (P.W. 7) and Mangal Singh peon came there.

The aforesaid boys-gave beatings to Km. Manju who became unconscious and fell down on the ground. During this period, Amichand Ramola brought 6-7 Jawans of P.A.C., whereupon, the accused-appellant Virendra Singh who had caught hold of Km. Manju, was apprehended by Madan Singh Kundra and Jagdish Prasad, head constable of P.A.C. while the other boys managed to escape. In the occurrence, Madan Singh Kundra and his daughter Km. Manju sustained injuries. In the occurrence, the culprits looted one H.M.T. wrist watch and one silver ring of Gomade from the possession of the informant Madan Singh Kundra. A written report of the occurrence was scribed by Madan Singh Kundra and lodged by him at the police station Kotwali Tehri. On its-basis, the head constable prepared a chick report and registered a case against the accused-appellant and his unknown companions for the offence u/s 395 I.P.C.

3. The medical examination of Km. Manju was made by doctor A. K. Pathak, Orthopaedic Surgeon at the Combined Hospital, Tehri at 8.15 p.m. He found the following injuries on her person.

(1) An abraded contusion over lower eyelid left eye outer side, pink in colour, measuring 2 cm x 1/2 cm Swelling over lower eye lid of left eye markedly present. Conjunctive below this injury left eye is reddish (congested).

(2) pain and swelling upper lip. Swelling markedly present with tenderness. No colour changes.

(3) pain and swelling temporal region left side. Tenderness markedly present. No colour change seen.

(4) pain and swelling proximal phalynx left middle finger. Tenderness markedly present.

(5) Complaint of pain abdomen right side. Tenderness present in right hypochondrium area. Slight fullness seen in tender area. Injury Nos. 1, 2 & 5 were caused by hard blunt object and were simple in nature. Injury Nos. 3, 2 and 4 were kept under observation. The injuries could have been caused on the date at 8.15 p.m.,

4. Dr. A. K. Pathak P.W. 3 also medically examined Sri MadanLal Kundra P.W. 1 on 7-1-1991 at 8.50 p.m. and found the following injuries on the person of injured Madan Singh Kundra

(1), Pain, swelling left cheek at the level of lower jaw premolars. Tenderness present.

(2) Crescent shaped punctured wound on inner side of left cheek against 1st premolar left lower jaw. Dark pink in colour measuring 2 mm x 1 mm x 1 mm.

(3) Substraction of first premolar tooth left lower jaw. Gums indurated and blood seen around gum of 1st premolar tooth.

(4) Contusion left thigh front side measuring 5 cms. x 4 cms. in size. Pink in

colour. Tenderness present.

5. According to Dr. A. K. Pathak, injury No. 1 was caused by hard blunt object such as lathi danda and fist and was simple in nature, injuries Nos. 2 and 3 were caused due to the impact of injury No.1 and injury No. 3 was grievous in nature and injury No. 4 was simple in nature and was sustained by some hard blunt object. According to Dr. A. K. Pathak, all these injuries could have been sustained by the injured on 7-1-1991 at about 8.15 p.m.

6. At the trial, the accused denied the prosecution case and claimed that he was arrested from Ghantaghar.

7. On a consideration of the evidence and circumstances on record, the Learned sessions Judge held that it was a case of spot arrest of the accused-appellant. He also believed the evidence about the robbing of the wrist watch and silver ring from the possession of the informant MadanLal Kundra. He, therefore, held the accused-appellant guilty of the offence u/s 395 I.P.C. and convicted and sentenced him accordingly. Being aggrieved by the same, the present appeal has been preferred.

8. I have heard the learned counsel for the parties and have also gone through the record.

9. In order to appreciate the facts of this case, the topography of the spot as revealed by the site plan (Ext. Ka-4) prepared and proved by the Investigating Officer may be briefly referred to. There is a road running from east to west and in the east, it reached the Chauraha, known as Ghantaghar Chauraha (clock Tower). To the north of this eastern part of the road, adjacent to the Ghantaghar Chauraha, there was a hospital extending from east to west. The Investigating Officer has recorded the presence of two mercury lights in front of that hospital on electric poles. To the south of this part of the road, was the house of the informant of this case Madan Singh Kundra, the then Tahsildar, Tehri Garhwal which opened towards north. On this road, there was a house towards east and then there was a nursing home in close vicinity of the Ghantaghar Chauraha. That to the south of the house of informant and the said house and nursing home, there was a building of exhibition ground at a short distance and to the south of this building, there were two P.A.C. camps whose distance had been mentioned by the informant in his testimony to be about 100 Mtrs. The scene of occurrence was the road in between the hospital situate towards the north and the house of the informant situate towards south of it.

10. Madan Singh Kundra informant (P.W. 1) has narrated the entire occurrence as mentioned above. He has proved the written F.I.R. lodged by him at the police station. Smt. Madhu Kundra (P.W.2) is the wife of informant. She has given eye witness account of the occurrence to the extent it was seen by her. The third eye witness of the occurrence was Km. Manju (P.W.7) who was the daughter of the informant. It is not in controversy that Smt. Madhu Kundra (P.W.2) and Km. Manju (P.W. 7) were living with informant in his house situated to the south of

the said road. The informant Madan Singh Kundra (P.W. 1) testified that on his reaching to the gate of his house, he saw that an altercation and marpit was taking place by the scooter-wala with six boys in front of the door of his house and that on his asking them not to quarrel, all of them rushed towards him and grappled with him; that when the grappling was taking place Smt. Madhu Kundra and Km. Manju came there and tried to intervene and rescue him; that in the meantime on an information given by Ami Chand Peon, 5-6 P.A.C. Jawans came there and by that time only one assailant had remained grappling with him and that person was arrested by the Jawans of P.A.C. and carried to the police station. He has also testified that he went to the hospital taking his daughter. He has identified the accused-appellant at the trial as a person who along with his companions had beaten him and had been arrested by the P.A.C. Jawans and taken to the police station. His testimony on the point finds substantial corroboration from the evidence of Smt. Madhu Kundra (PW. 2) and Km. Manju (P.W. 7). It also finds corroborations from the written F.I.R. lodged by Madan Singh Kundra at the police station. It also finds corroboration from the factum of spot arrest of the accused-appellant at the time of occurrence which is amply established on record. The G. D. entry about the registration of the case (Ext. Ka-7) also corroborates the testimony of the informant on the point of spot arrest. It clearly mentions about the lodging of accused-appellant Virendra Singh at the police station by the informant and P.A.C. Hawaldar Jagdish Prasad. This entry has been duly proved at the trial by Head Constable Surendra Singh (P.W. 6). The said Head Constable has also testified that the accused-appellant was brought at the police station along with a written F.I.R. by informant and P.A.C. Hawaldar Jagdish Prasad. He has also testified that the accused-appellant had injuries on his body and he was sent for medical examination. The statement of the witness about lodging of the accused-appellant along with written F.I.R. by informant and P.A.C. Hawaldar Jagdish Prasad has been specifically elicited from him in his cross-examination on behalf of the accused-appellant. The spot arrest of the accused-appellant-is also corroborated by the defence coming from the side of accused-appellant. In the cross-examination of the informant it was elicited that the Ghantaghar Chauraha was at a distance of about 150-200 meters from the gate of his house and a suggestion was made that the accused-appellant was got arrested and implicated in this case only because he was a boy and was standing near the scene of occurrence. In the cross-examination of Krishna Sagar S. I. (P.W. 4), who had initially investigated the case, it was suggested that the accused-appellant was arrested at Ghantaghar Chauraha. Then in his own statement u/s 313, Cr. P.C., the accused-appellant while answering the question No. 4 about his arrest by Jagdish Prasad and others on the spot, stated "Mujhe Ghantaghar Me Pakra Tha". No evidence was led in defence. He did not say anything in his statement u/s 313, Cr. PC. as to why, the prosecution witnesses have been deposing against him though he stated that the prosecution witnesses were liars.

11. It may also be stated here that the testimony of the informant was also

corroborated by the medical examination report given by Dr. A. K. Pathak (P.W. 3) who had medically examined Madan Singh Kundra on 7-1-1991 at 8.50 p.m. as noted above. It is also corroborated by the medical evidence relating to Km. Manju given by Dr. A. K. Pathak (aforesaid) who medically examined her at 8.15 p.m. on 7-1-1991 at the said combined hospital.

12. Lot of arguments have been advanced by the learned senior counsel appearing for the accused-appellant based on numerous contradictions and variations that have crept in the prosecution evidence at the trial. He has pointed out that Smt. Madhu (P.W. 2), wife of the informant, on seeing the accused-appellant at the trial, stated that she never saw him before. Actually, her statement was that the P.A.C. men had come and apprehended the boy, who had given a fist blow on the mouth of her daughter Km. Manju (P.W. 7) then she has further stated that she (witness) was in a terrified state and so how she (witness) could remember his face. She had further stated on seeing the accused-appellant "Maine Ese Pahale Kabhi Nahi Dekha Us Din Yah Tha Ya Nahi." This statement is not a categorical statement that she did not see the accused-appellant on the spot at the date and time of occurrence. On the contrary, this statement is to the effect that she cannot say whether he was present on that day or not. This statement, therefore, cannot undo or belie the testimony given by the informant about his being amongst the culprits and about his being arrested at the spot.

13. Reliance was then placed by the learned senior counsel for the accused-appellant on the statement of Km. Manju (P.W. 7). In her examination-in-chief, she stated that she does not know if the accused-appellant was the person who had beaten her and whether he was amongst the four persons who were seen by her surrounding the informant. She has been declared hostile by the prosecution and her cross-examination has been done but even taking her statement as such, it does not go to belie or discredit the testimony of the informant about the participation of the accused-appellant in the occurrence and his spot arrest and about his being taken to the police station and his being lodged there along with the written F.I.R.

14. It has been argued by the learned senior counsel for the accused-appellant that since the informant did not know him from before, he should have been put up for test identification during the investigation and as this was not done, the evidence given by him against the accused-appellant at the trial cannot be accepted. This argument cannot be sustained for a moment. In a case, like the present where a culprit is arrested on the spot while committing the offence and taken in custody to the police station and lodged there, once these facts are established there is no occasion or need for holding the test identification parade.

15. The learned senior counsel for the accused-appellant has tried to derive advantage from the discrepancies about the persons who made the spot arrest, who took the accused-appellant to the police station and lodged him there. It has been pointed out that it has come in evidence that Km. Manju (P.W.7) having

been injured, the informant Madan Singh Kundra (P. W. 1) took her to the hospital, that he has also testified that a Jawan of P.A.C. had arrested the accused appellant on the spot and taken him to the police station and lodged there. The P.A.C. Hawaldar Jagdish Prasad (P.W. 5) has testified that on 7-1-1991 when he was present at his Camp Exhibition ground at about 8.30 p.m., a person came running and told him that the Tahsildar is being beaten by 6-7 persons under the influence of drink; that in the meantime 2-3 P.A.C. Jawans came down and by then all had run away; that only one person was present there and that the Tahsildar himself has taken him to the police station; that he still does not know him and further he stated on seeing the accused-appellant at the trial, that he was not that person. It has been stressed by the learned senior counsel for the accused-appellant that this witness was not declared hostile by the prosecution. It is correct that tried prosecution ought, to have declared him hostile and cross-examined him and confronted with his statement u/s 161 Cr. PC. the G. D. entry about the registration of the case. However, this failure of the prosecution cannot in the circumstances of this case go to discard or discredit the prosecution case against the accused-appellant which has been amply established, as noted above. This witness Jagdish Prasad, P.A.C. Hawaldar (P.W. 5) did testify that he saw one culprit present at the spot and that that person was taken to the police station. In his cross-examination, he stated that he had arrested that person on the public road. When the occurrence took place on the public road, the arrest was naturally made from the public road. We have already noted that the accused-appellant has having admitted his spot arrest and has given no ? explanation of the same. I may mention here that as noted earlier Head Constable Surendra Singh of the Police Station (P.W. 6) had entered the witness box and proved the G. D. entry Ext. Ka-7 about the lodging of the F.I.R. and testified about the lodging of the accused-appellant by informant and also by Jagdish Prasad P.A.C. Hawaldar (P.W.5) and that this statement of the witness has come in the cross-examination from side of defence itself. No defence suggestion was made to the Head Constable Surendra Singh (P.W. 6) challenging the G. D. entry about the lodging of the accused-appellant at the police station by the informant and P.A.C. Hawaldar Jagdish Prasad (P.W. 5) aforesaid. On the contrary, it was brought on record by the defence itself in the cross-examination of Head Constable Surendra Singh (P. W. 6) that he had sent the accused-appellant for medical examination after the registration of the case as there were injuries on his body. Further, it was elicited by the defence from this very witness that the medical report in respect of the accused-appellant was given by him (P.W.5) to the Investigating Officer. All this cross-examination would go to show that as; per the defence itself this accused-appellant was arrested on the spot and he was brought to the police station in custody and lodged there by the informant and Jagdish Prasad, a P.A.C. Hawaldar (P.W.5). That being so, the accused-appellant cannot get any benefit out of any contradiction on the question as to who actually carried the accused-appellant in custody from the scene of occurrence to the police station.

16. It has been argued that there is no mention in the F.I.R. that after the accused-appellant was arrested on the spot, he was asked to disclose his name and that he disclosed his name. This argument is also of no avail to the accused-appellant because on spot arrest when the person arrested was not known from before he would naturally have been asked at the spot or in the way or at the police station on being lodged as to what was his name etc. In the G. D. entry about the registration of the case, his name and address have been mentioned which means that the accused-appellant had disclosed the same at the police station at the time of lodging of the F.I.R. Nothing therefore revolves on the same.

17. Capital is sought to be made by the de-fence from the statement of informant that his daughter Km. Manju had become unconscious during the occurrence and that he had taken her straightway to the hospital where she regained consciousness in 1-2 hours. The argument sought to be raised is that it meant that the informant reached the police station two hours later and then the F.I.R. was prepared and made ante timed. The learned A.G. A. has rightly pointed out that from the statement of informant, it does not follow that after taking Km. Manju (P. W. 7) to the hospital he continued at the hospital till she regained her consciousness and that the informant who was a responsible public officer would have gone to the police station knowing full well that the F.I.R. is to be lodged about the occurrence where the accused-appellant has been arrested on the spot. So it makes no difference that a P.A.C. Jawan took the arrested accused-appellant from the spot of arrest straight to the police station and the informant went to the police station via the hospital. It may be mentioned that the informant has stated in his testimony that after leaving the daughter at the hospital, he went to the police station where he lodged the F.I.R. and, in fact, he has further stated that before the accused-appellant could be brought to the police station, where he was carried, he met them at the front gate where he came by a shorter route. That explains the position. Even assuming that the informant reached the police station a little later and a Hawaldar of P.A.C. brought the accused-appellant to the police station a little earlier, it makes no difference. The G. D. entry about the registration of the case is to be read in its pith and substance and there is no reason to doubt it.

18. Reliance has been placed by the learned senior counsel for the accused-appellant on the fact that Km. Manju (P.W. 7) had herself stated in her examination-in-chief that she could not identify any of the assailants because of darkness. This statement does not necessarily go to belie the testimony of the informant on the point. As noted earlier, the Investigating Officer found two mercury lights on electric poles in front of the hospital in the vicinity of the place of occurrence. The informant also has testified to the light of tube light of hospital and that a mercury bulb was burning and not a word was put to him to challenge this statement of fact. Furthermore the question of light becomes inconsequential because it is a case of spot arrest. It could be of importance only in case some of the culprits were to be arrested during investigation and put up

for test identification which did not take place. For the same reason it is immaterial that the P.A.C. Hawaldar Jagdish Prasad (P.W. 5) in his cross-examination testified that when he reached the spot, there was darkness.

19. Now the question is as to what was the total number of the culprits who had participated in the occurrence. In the F. I.R., the number has been disclosed as 5-6 boys by the informant Madan Singh Kundra (P.W. 1). In his testimony at the trial, he testified that there were 5-6 boys who were grappling and doing Marpit with each other. In his cross-examination, it has come that the boys were doing Marpit with a scooter-wala, who was on the receiving end. It was nowhere suggested to him in his cross-examination by the learned counsel for the defence at the trial that the number of assailants was less than five. Smt. Madhu Kundra (P.W.2) no doubt stated the number of assailants as 3-4 and Km. Manju (P.W. 7) daughter of informant, stated that four persons were surrounding the informant when she peeped down from her window. Both these witnesses were declared hostile at the trial. Furthermore, these two witnesses have not seen the occurrence in its entirety. The evidence indicates that all the participants, except the accused-appellant, who got arrested on the spot, managed to escape. So that testimony of these two witnesses does not belie the testimony of the informant at the trial. I may mention here that the injuries recorded on the body of the informant in this case were many and it indicates the plurality of the assailants. Then the P.A.C. Hawaldar Jagdish Prasad (P.W. 5), who appeared to be hostile to the prosecution, as noted earlier, stated in his examination-in-chief that a person came running to him and told him "Tahsildar Saheb Ke Yahan 6-7 Aadmi Daru Pikar Marpit Kar Rahe Hai." This information was about the persons who were the assistant at the spot and is admissible u/s 6 of the Indian Evidence Act as res gestae. He was not suggested in his cross-examination that "no such information was given or that" this information was wrong. It may also be mentioned here that Smt. Madhu Kundra and Km. Manju (P.Ws.) had given the number of persons who were surrounding the informant. They have not specifically stated about the total number of the culprits present at the spot. So also there is. no real conflict between the testimony of the informant and of the two witnesses at the trial about the total number of culprits. I am of the view that the evidence on record clearly establishes that total number of culprits that participated in the occurrence was five or more and they inflicted injuries on the bodies of the informant and also Km. Manju (P.W. 7). The evidence on record has also indicated that the informant received simple and grievous injuries while Km. Manju received simple injuries on her person.

20. Now it is true that in the F.I.R., it was said that the culprits snatched away the H.M.T. (Kanchan) wrist watch of the informant and also relieved him of a ring containing gamed but at the trial, the informant Madan Singh Kundra (P.W. 1) has stated in his examination-in-chief "Es Chhina-Jhapti Men Meri H.M.T. Kanchan Ghari Aur Gomed Ki Anguthi Bhi Chali Gai." In his cross-examination, he stated that the wrist-watch and the ring were snatched away by some one of the assailants but he added "Ho Sakta Hai Ki Guttham Guttha Me Wahin Giri Ho Lekin

Mujhe Waha Mili Nahi". This reply of this witness rules out the offence of dacoity or attempted dacoity punishable u/s 395 I.P.C. and to that extent the contention of the learned senior counsel for the accused-appellant ought to be accepted that the facts established do not make out a case of dacoity at all. The learned senior counsel for the accused-appellant has argued that since it was not known as to who inflicted the grievous injury (dislocation of tooth of the informant) and considering the circumstances of the case, it cannot be said that the offence u/s 325 I.P.C. was made out against the accused-appellant on the basis of the constructive liability and that "only the offence u/s 323 I.P.C. can be said to be made out against the accused-appellant, if at all. In my view, it cannot be doubted that the offence u/s 323 I.P.C. has been made out from the evidence on record. However, besides this, the offence u/s 147 I.P.C. is also made out against the accused-appellant.

21. On the question of sentence the argument has been made by the learned senior counsel for the accused-appellant that he was convicted and sentenced by the learned sessions Judge on 7-12-1995 and taken into custody and sent to jail the same day and it was only on 10-1-1996 that he was admitted to bail by this Court which meant that he has been in jail custody for about one month and 7 days keeping in view the time that would normally be taken in obtaining copy of the bail order from the High Court; taking it to Tehri Garhwal and furnishing of bail bonds and acceptance thereof by the learned Chief Judicial Magistrate concerned and consequently the sentence be reduced to this period and in lieu thereof, fine may be imposed. Keeping in view the nature of the offence, the fact that the occurrence related to the year 1991 and that the accused-appellant has been on bail during the trial and also during, the pendency of this appeal in this Court, the sentence of imprisonment may be properly reduced to the period already undergone by the accused-appellant as an under-trial and as a convict and a fine of Rs. 3000/- for the offence u/s 147 I.P.C. with a suitable default clause and for the offence u/s 323 I.P.C. the sentence of imprisonment already undergone would meet the ends of justice.

22. For the reasons aforesaid, the appeal is partly allowed. The conviction of accused-appellant Virendra Singh u/s 395 I.P.C. is altered to one under Sections 147 and 323 I.P.C. and his sentence is allowed to the period of imprisonment already undergone by him as an under-trial and as a convict and a fine of Rs. 3000/- in lieu thereof and in default of payment of fine, to simple imprisonment for 15 days for the purpose u/s 147 I.P.C. for the offence u/s 323 I.P.C, his sentence is altered to the period of imprisonment already undergone by him as an under trial and as a convict. He is on bail from this Court. He is given one month's time from today to deposit the amount of fine in the Court of Sessions Judge, Tehri Garhwal. The bail bonds furnished by him in pursuance of bail order passed by this Court in this appeal shall continue to remain in force for a month from today. In default of payment of fine, the accused-appellant shall be arrested and sent to jail to serve out the sentence of imprisonment in default accordingly to law.

23. Let a copy of this judgment be sent at once to the learned Sessions Judge, Tehri Garhwal by the office of the High Court for information and compliance. The learned Sessions Judge concerned shall submit the compliance report to this Court within six weeks from today.

24. This appeal shall be listed again before this Bench in Chambers at 1.30 p.m. for orders on 23-8-1999 along with the compliance report of the Sessions Judge concerned.