Vinod @ Nasmulla Vs State Of Chhattisgarh

Court: Supreme Court Of India

Date of Decision: Feb. 14, 2025

Acts Referred: Constitution of India, 1950 â€" Article 136
Code of Criminal Procedure, 1973 â€" Section 161
Indian Penal Code, 1860 â€" Section 395, 397
Arms Act, 1959 â€" Section 25, 25(1)(b), 25(1)(b)(a)
Evidence Act, 1872 â€" Section 9

Hon'ble Judges: Pamidighantam Sri Narasimha, J; Manoj Misra, J

Bench: Division Bench

Advocate: Manish Kumar Gupta, Sangita Gupta, Sharad Prakash Pandey, Apoorv Shukla, Puneet Chahar, Prabhleen A. Shukla

Final Decision: Allowed

Judgement

Manoj Misra, J

1. This appeal impugns the judgment and order of the High Court of Chhattisgarh, Bilaspur Ã¢â‚¬Å“The High CourtÃ¢â‚¬ dated 03.01.2018 passed in Criminal

Appeal No.3014 of 1999 whereby the appeal of the appellant against the judgment and order of the Sessions Judge, (Surgujha) Ambikapur (then in

Madhya Pradesh) dated 26.10.1999, passed in Sessions Trial No.292 of 1994, has been dismissed and conviction of the appellant under Section 395

read with Section 397 of the Indian Penal Code, 1860 Ã¢â‚¬Å“IPCÃ¢â‚¬â€‹ and Section 25 of the Arms Act, 1959 Ã¢â‚¬Å“Arms ActÃ¢â‚¬â€‹ has been upheld.

2. The appellant Vinod @ Nasmulla and Mohd. Kalam Ansari were jointly tried by the Court of Session, (Surguja), Ambikapur (now in the State of

Chhattisgarh). Mohd. Kalam Ansari was acquitted whereas the appellant was convicted under Section 395 read with Section 397 of the IPC and

Section 25 (1)(b) of the Arms Act. Under Section 395 read with Section 397 of the IPC he was sentenced to seven years rigorous imprisonment along

with fine of Rs.2,000/-, coupled with a default sentence of eight months; and for the offence punishable under Section 25(1) (b) (a) of the Arms Act,

he was sentenced to one and a half years of rigorous imprisonment along with fine of Rs.500/-, coupled with a default sentence of three months. All

sentences were to run concurrently.

Prosecution Case

3. The prosecution case in brief is that while Bus bearing registration No. U.P. 42-A 5406 of Adarsh Transport Bus Service was going to Raipur in

the night of 28.09.1993, at about 11:30 p.m., one person, who was sitting behind the driver, put a country-made pistol on the temple of the driver and

ordered him to stop the bus. When the bus stopped four persons already travelling in the bus and four other persons, who boarded the bus from where

it had stopped, inter alia, started beating the passengers and robbed them of their belongings. A shot was also fired at one of the passengers who

sustained injuries. The culprits thereafter escaped with looted articles. The driver took the bus to the Police Station, Ambikapur where First

Information Report (FIR) was lodged at about 12:20 a.m. on 29.09.1993. Whereafter the police swung into action, barricades were put to ensure that

culprits do not escape and, ultimately, it is claimed, in the night of 29.09.1993 itself, Khemraj Singh (PW-5) arrested the appellant, at about 3:00 a.m.,

carrying a country-made pistol, which had five cartridges, two live and three empty. On 30.09.1993, the appellant was put to test identification parade

(for short TIP) wherein he was identified by the bus driver Ram Sajeevan Sharma (not examined) and Khalasi Ainul Khan (not examined). The other

person, who was also there in the bus, namely, Kamal Singh (the Conductor of the bus), though was asked to identify the accused, failed to identify

him. Based on the alleged confessional statement made during investigation, Mohd. Kalam Ansari was arrested and put to trial along with the

appellant.

Prosecution Evidence

4. Though a number of witnesses were examined by the prosecution but eye witnesses (i.e., passengers in the Bus) examined were only three,

namely, PW-6, PW-9 and PW-12. However, none of them had participated in the TIP of the appellant. PW-6, PW-9 and PW-12 proved commission

of dacoity whereas PW-9 identified the appellant in Court, during the course of the trial, as the one, amongst those dacoits, who had put the gun on the

temple of the driver. PW-

5 was witness of appellantÃ¢â‚¬â„¢s arrest and recovery of country-made pistol. PW-7 (i.e., the Naib Tehsildar), who executed the TIP of the appellant,

proved the TIP and PW-8 (i.e., the Additional Tehsildar) proved the TIP of Mohd. Kalam Ansari.

Trial Court Finding

5. The trial court, inter alia, held that the factum of dacoity is duly proved; PW-9 identified the appellant as one of the dacoits who committed the

crime; PW-5 proved recovery of country-made pistol from the appellant and, therefore, the appellant is liable to be convicted. The trial court, however,

acquitted co-accused Mohd. Kalam Ansari.

High Court Finding

6. Aggrieved by the judgment and order of conviction, the appellant preferred appeal before the High Court, though without success. Aggrieved by

dismissal of the appeal, the appellant is before us.

7. We have heard the learned counsel for the appellant; the learned counsel representing the State of Chhattisgarh; and have perused the records.

Submissions on behalf of Appellant

8. The submission of the learned counsel for the appellant is as follows:

(i) The prosecution has withheld the best evidence, namely, the driver of the bus at whom the gun was pointed and who allegedly identified the

appellant in the TIP. Besides that, neither the conductor nor the Khalasi (i.e., the Cleaner), who participated in the TIP, was examined by the

prosecution.

(ii) PW-9 is a police personnel whose presence in the Bus at the time of dacoity is doubtful because, firstly, his papers relating to his movement were

not brought on record and, secondly, if he was present, there was no reason not to use him for identification during the TIP. Even if it is assumed that

he was travelling in the Bus, his non-participation in the TIP renders him unreliable, more so, because in his testimony he admits that he had seen the

appellant earlier.

(iii) No stolen/ looted article was recovered either from the possession of the appellant or at his pointing out.

(iv) The country-made pistol alleged to have been recovered is not linked to the gun shots that were allegedly fired with the aid of any forensic

evidence.

(v) The manner in which the appellant is stated to have been arrested by PW-5 at 3.00 a.m. in the night does not inspire confidence. Moreover, if the

appellant was carrying a loaded pistol, why he would not use it to effect his escape, particularly, when PW-5 was alone and attending natureÃ¢â‚¬â„¢s

call.

9. Based on the above submissions, the learned counsel for the appellant submitted that the trial court as well as the High Court has accepted the

testimony of the prosecution witnesses without testing it on the anvil of probability, therefore, the judgment and order of conviction deserves to be set-

aside.

Submissions on behalf of State

10. Per contra, the learned counsel for the State submitted that the factum of dacoity is proved beyond doubt; PW-9 has identified the appellant as the

culprit who pointed the gun at the driver to ensure that the bus stopped; there is nothing to indicate as to why PW-9 would falsely implicate the

appellant; the TIP was promptly conducted; PW-7, the Naib Tehsildar, in whose presence the TIP was conducted, has proved that in the said parade

the appellant was identified; PW-5 proved that in the night of the incident, the appellant was arrested while he was carrying a country-made pistol; and

the forensic examination of the pistol reveals that it was in a working condition with live cartridges. These evidences, inter alia, duly proved the

involvement of the appellant in the commission of crime and therefore, the order of conviction and sentence is based on proper appreciation of the

evidence on record and does not call for interference in exercise of power under Article 136 of the Constitution of India.

Analysis

11. Before analysing the rival submissions, it would be useful to cull out facts as regards which there is no dispute. These are:

(i) The incident for which the prosecution was launched is of dacoity where a running bus, carrying 35 passengers, was looted by about eight armed

men in the night of 28.09.1993. However, only two including the appellant were put to trial.

(ii) No looted article of any kind is stated to have been recovered either from, or at the instance of, the appellant or the other accused. The country-

made pistol stated to have been recovered from the appellant at the time of arrest is not connected to any empty cartridge, or bullet, that might have

been found at the spot or extracted from the person injured.

(iii) Neither the FIR nor the statements of eyewitnesses recorded under Section 161 CrPC name the appellant or for that matter any other accused.

(iv) Though the TIP was carried out with the aid of Driver, Khalasi (i.e., the Cleaner) and Conductor of the Bus, none of them was examined as a

witness during trial.

(v) PW-9 is the only witness who identified the appellant on the dock as one of the dacoits who participated in the dacoity.

(vi) PW-5 is the only witness of arrest of the appellant in the night of 29.09.1993.

12. From the facts culled out above, there are just two pieces of evidence against the appellant, namely,

(a) dock identification by PW-9; and (b) arrest of the appellant that night with a country-made pistol by PW-5. We shall deal with each of them

separately.

Dock Identification by PW-9 not reliable

13. Before we proceed to test the reliability of the dock identification by PW-9, it would be apposite to examine the evidentiary value of the TIP

conducted during investigation to identify the appellant.

14. A test identification parade under Section 9 of the Evidence Act, 1872 [Section 9.- Facts necessary to explain or introduce relevant facts. - Facts

necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact,

or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact

happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose]

is not substantive evidence in a criminal prosecution but is only corroborative evidence. The purpose of holding a test identification parade during the

stage of investigation is, firstly, to ensure that the investigating agency is proceeding in the right direction where the accused is unknown and, secondly,

to serve as a corroborative piece of evidence when the witness identifies the accused during trial.[Umesh Chandra v. State of Uttarakhand, (2021) 17

SCC 616, (paragraph 9); Iqbal and Another v. State of Uttar Pradesh, (2015) 6 SCC 623 (paragraph 15)] The evidence of identification merely

corroborates and strengthens the oral testimony in court which alone is the primary and substantive evidence as to identity.[Hari Nath and Another v.

State of U.P., (1988) 1 SCC 14 (paragraph 19)] In Rameshwar Singh v. State of Jammu and Kashmir (1971) 2 SCC 715, a three-Judge Bench of this

Court succinctly summarized the evidentiary value of the TIP as under:

Ã¢â‚¬Å“6Ã¢â‚¬Â¦Ã¢â‚¬Â¦. The identification during police investigation Ã¢â‚¬Â¦Ã¢â‚¬Â¦. is not substantive evidence in law and it can only be used for corroborating or contradicting evidence

of the witness concerned as given in Court. The identification proceedings Ã¢â‚¬Â¦Ã¢â‚¬Â¦ must be so conducted that evidence with regard to them when given at the trial,

enables the court safely to form appropriate judicial opinion about its evidentiary value for the purpose of corroborating or contradicting the statement in Court of the

identifying witness.Ã¢â‚¬â€‹

Thus, if the witness who identified a person or an article in the TIP is not examined during trial, the TIP report which may be useful to corroborate or

contradict him would lose its evidentiary value for the purposes of identification. The rationale behind the aforesaid legal principle is that unless the

witness enters the witness box and submits himself for cross-examination how can it be ascertained as to on what basis he identified the person or the

article. Because it is quite possible that before the TIP is conducted the accused may be shown to the witness or the witness may be tutored to

identify the accused. Be that as it may, once the person who identifies the accused during the TIP is not produced as a witness during trial, the TIP is

of no use to sustain an identification by some other witness.

15. In the instant case, though it was proved by PW-7 (i.e., the Naib Tehsildar who executed the TIP) that the TIP for identifying the appellant was

conducted and the appellant was identified by two out of three witnesses, those three witnesses who participated in the TIP of the appellant were not

examined during trial. Thus, the TIP report, which could have been used to either contradict or corroborate those witnesses, is of no evidentiary value.

Hence, the only substantive evidence on record of the case in respect of identification of the appellant is the dock identification by PW-9.

16. The dock identification by PW-9 does not inspire our confidence for the following reasons:

(a) PW-9 is a police personnel posted at police station Prem Nagar. During cross-examination, on being questioned about his movement papers, he could not provide

a satisfactory explanation for his movement in that bus.

(b) As per the investigating officer, PW-9Ã¢â‚¬â„¢s statement was recorded on the same day the FIR was registered. The appellant was also arrested that very night

within few hours of the incident. Yet, PW-9 was not used for identifying the accused during the TIP. His non-participation in the TIP, seriously dents his credibility.

(c) PW-9 in his deposition stated that he had seen the appellant earlier on more than one occasion. If that was so, there was all the more reason for the investigating

officer to use him in the TIP. More so, when, as a police personnel, he was under the control of the prosecution.

17. Besides that, when you withhold the best evidence such as that of the driver, conductor and cleaner of the Bus, who all participated in the TIP,

without giving good reason as to why they were not produced or summoned, the dock identification by a solitary witness, that too a police personnel,

fails to inspire our confidence to sustain conviction of the appellant for the offence punishable under Section 395 read with Section 397 of the IPC,

particularly, in absence of corroborative evidence of recovery of any looted article either from, or at the instance of, the appellant.

Manner in which arrest has been effected is doubtful

18. As regards the manner in which the appellant is stated to have been arrested, prosecution case rests on the testimony of PW-5. PW-5 is a police

constable. According to him, while he was going to attend natureÃ¢â‚¬â„¢s call on 29.09.1993, at around 3:00 a.m., he saw the appellant hiding in the

bushes near a public pond, probably to evade arrest, as the police had been on the look-out for the dacoits. PW-5 says that the appellant tried to

escape by threatening to use his country made pistol, but he managed to overpower and arrest the appellant; and later he along with the pistol was

handed over to the police station in-charge.

19. The prosecution evidence indicates that country-made pistol had two live cartridges and three empty cartridges.

20. The appellant had denied the factum of arrest in the manner alleged and had also produced defence witnesses, but neither the trial court nor the

High Court discussed the defence evidence.

21. Ordinarily, if a person is carrying a loaded weapon, he would use the same to evade arrest unless the person is completely outnumbered. Here, the

appellant is stated to have been arrested by PW-5, who was single and about to attend natureÃ¢â‚¬â„¢s call. Moreover, there is no injury on either side to

suggest that resistance was offered at the time of arrest. Such a prosecution story is too convenient to be acceptable as true. More so, when it had

support from police witnesses only. Therefore, the court should have been circumspect so as to look for corroborative pieces of evidence. This we say

so, because it is not uncommon for the police to be under pressure to quickly resolve a case having implications on public order and therefore, look for

soft targets.

22. Here, there is neither recovery of any looted article from the appellant or at his instance, nor the country-made pistol was linked to any empty

cartridge recovered from the Bus or the scene of crime. There is also no injury report to substantiate that the appellant offered resistance before he

was apprehended. In absence of any such corroborative evidence, it would be too naive on our part to accept the prosecution story regarding the

manner in which the appellant is stated to have been arrested.

23. Besides above, from paragraph 34 of the trial court judgment, we could notice that the seizure memo (Exb. P/11) of country made pistol, etc. was

prepared at 11:45 hours on 29.09.1993, which is about nine hours after the appellant was allegedly arrested. Such a long delay in producing the seized

articles at the police station for preparing seizure memo, in absence of cogent explanation, dents the credibility of prosecution story regarding the

arrest of the appellant at about 3 a.m. on 29.09.1993.

24. Once we doubt the manner in which the appellant is stated to have been arrested, the recovery of country-made pistol alleged to have been made

at the time of arrest falls to the ground. Besides that, from paragraphs 33 and 34 of the trial court judgment, it appears that the country made pistol

produced during trial did not match with the description of the seized weapon in the seizure memo. This discrepancy was casually brushed aside by

observing that it may be due to rusting. That apart, the seized article(s) were sent for forensic examination on 22.06.1994, as would appear from

paragraph 34 of the trial court judgment. All these circumstances, taken cumulatively, seriously dent the credibility of the prosecution case qua

recovery of country made pistol from the appellant at 3 a.m. in the night of 29.09.1993.

25. In the light of the analysis above, we are of the view that the prosecution has failed to prove the guilt beyond reasonable doubt. The appellant is

therefore, entitled to the benefit of doubt. The appeal is allowed. The judgment and order of the trial court and the High Court are hereby set-aside.

The appellant is acquitted of the charge for which he was tried. The appellant is reported to be on bail. He need not surrender. His bail bond is

discharged.

26. Let a copy of this order be sent to the concerned court.