

(2014) 01 AHC CK 0224

Allahabad High Court

Case No: Criminal. Appeal No. 795 of 1983

Udai Pal

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Jan. 15, 2014**Acts Referred:**

- Arms Act, 1959 - Section 25
- Penal Code, 1860 (IPC) - Section 396

Citation: (2014) 86 ALLCC 154**Hon'ble Judges:** Sunita Agarwal, J; Amar Saran, J**Bench:** Division Bench**Advocate:** G.P. Dixit, K.S. Tiwari and Janardan Sahai, Advocate for the Appellant**Final Decision:** Allowed

Judgement

Amar Saran, J.

This criminal appeal arises out of the judgment and order dated 28.2.1983, passed by the Special Judge, Budaun, in S.T. No. 89 of 1982, convicting and sentencing the appellant to imprisonment for life u/s 396 I.P.C. The other 11 accused persons were acquitted by the same judgment. Although this case is listed peremptorily today but Sri G.P. Dixit, learned Counsel for the appellant has not appeared. There is also no mention for passing over the case.

2. In the light of the law laid down in [Bani Singh and others Vs. State of U.P.](#), and [K.S. Panduranga Vs. State of Karnataka](#), we propose to hear and decide this appeal after hearing learned A.G.A. and after perusing the Trial Court judgment and record, and do not think it proper to adjourn the case for default of the learned Counsel or to delay the proceedings by appointing an amicus curiae.

3. The prosecution case was that on 18.11.1981 at about 4.30 p.m. there was a dacoits in the house of the informant Jalim Singh, in which two named persons, the appellant Udaipal and co-accused Bihari, his brother participated along with 14-15 other unknown miscreants armed with rifle, gun and country made pistols. They are said to have taken away the SBBL licensed gun No. 407/64 along with a cartridge belt containing 50 cartridges. They had also looted some house hold items. At that time, the informant Jalim Singh, his brother Yadram and the two deceased Munna Lal, nephew of the informant and Mishri Lal, a cousin brother of the informant were feeding their cattle. Munshi Lal and Munna Lal were shot dead in the premises whereas the informant and his brother Yad Ram ran away towards the jungle. Thereafter the informant lodged the report (Ext. Ka-1) at the Police Station Bilsa which was 7 miles away at 8.45 p.m. on the same day. The informant claimed that he could identify the other miscreants whom he had seen at the time of incident.

4. PW-9, S.O. Virendra Singh, who was present at the police station when the report was lodged started investigation of the case and reached the village. As it had become dark, he got the inquest prepared by S.I. Khushi Ram the next day on 19.11.1981 and got the other papers as well as letter for post-mortem prepared.

5. The post-mortem was conducted by Dr. R.K. Khanna on 20.11.1981 at 3.30 p.m. and 4.00 p.m. on the two cadavers of the deceased Munna Lal, who was found to have received one gun shot injury and Munshi Lal, who had three gun shot entry wounds. The cause of death of the two deceased was shock and haemorrhage due to ante-mortem gun shot injuries.

6. It is noteworthy that in this case, the other named accused Behari died before commencement of the trial, hence his trial abated. The appellant who was named in the FIR was tried along with 11 other persons who were subsequently nominated after investigation and who were put up for identification as they were not known to the witnesses from before. The other 11 persons have been acquitted by the Trial Judge on the ground that the test identification was conducted only on 9.2.1982, i.e. 46 days after the arrest of the accused and that the evidence of identification was not very reliable.

7. PW-5 R.B. Chauhan was the Executive Magistrate, who conducted the test identification proceedings of the other acquitted accused. PW-6 S.I. Mukhbir Singh arrested the accused Mishri Lal, u/s 25 of the Arms Act and PW-7 Arjun Singh, Sub-Inspector produced the accused persons for test identification. PW-8 Head Constable Lajja Ram prepared the check FIR.

8. One witness DW-1 Net Ram has been examined to show the enmity of the informant and other prosecution witnesses with some of the acquitted accused as well as the appellant.

9. The prosecution has examined four eye witnesses; they are PW-1 Jalim Singh, his brother PW-2 Yad Ram, PW-3, Sohan Lal and Matru PW-4.

10. PW-1 Jalim Singh has deposed that Bihari and his father Bholey had been involved in a murder case which had taken place 15 years earlier. In that murder case, the informant Jalim Singh PW-1 and his brother PW-3 Yadram had given evidence against Bihari and Bholey, who had been convicted. That was the cause of the enmity between the parties. The incident had taken place in the manner mentioned in the FIR by Jalim Singh.

11. In his evidence, PW 1 has further clarified that it was the fire made by Bihari which struck Munshi Lal and the fire by the appellant Udaipal struck Munna Lal causing their deaths on the spot. He claims to have identified the other accused persons in the test identification proceedings. He further mentioned that some miscreants had been apprehended by the police some days prior to this incident, but who had made good their escape leaving their arms behind, which had been seized by the police. The appellant Udaipal and his brother Bihari had disclosed that Yad-ram and Jalim Singh were Mukhbirs (informers) of the police because of which the said arms had been recovered by the police.

12. PW-3 Yadram came out with the same version as PW-1 Jalim Singh regarding the manner of incident and the motive for the crime. He also confirmed that a dacoity had taken place at about 4.30 p.m. on 18.11.1981 in which the dacoits had decamped with the gun and other property from the house of the informant and this witness. This witness as well as Jalim Singh had stated that the accused persons came to their house and started firing. He along with Jalim had hidden behind a ladaura (cow-dung heap). After that they ran away towards the jungle, where they were chased by the accused persons, but the accused persons were then directed by their companions to return. This witness as well as Jalim Singh did not know whether Bihari and Bholey had been acquitted in the murder case, in which Jalim Singh and Yadram were witnesses. Jalim Singh and Yad Ram also stated that the appellant was a neighbor who resided in the adjoining house as is also shown in the site plan. PW-3 further stated that the other two witnesses Sohan Lal and Matru used to reside in different Mohallas and they traveled a distance of 200-250 yards to come and witness the incident.

13. PW-2 Sohan Lal has also deposed that a dacoity had taken place in the house of Jalim Singh, in which 14-15 dacoits including Bihari and the appellant Udaipal had participated. He was standing at Lakhan's door along with Matru and Mahabir (who has not been produced in this case) and that the fire of Bihari had struck Munshi Lal and Udai Pal's fire had struck Munna Lal. He had given a statement to the I.O. the next day. He also claimed that he had identified the other accused persons in the test identification proceedings.

14. PW-4 Matru has given a similar version as PW-2 Sohan Lal. He also claims to have seen the incident from Lakhan's house. He further admitted that one dacoit had tied a "Dhata" on his face. He also mentioned the same version as was deposed to by Jalim Singh and Yadram regarding a murder case in which Bholey and Bihari had

been convicted about 15-16 years earlier. However, he admitted that some years prior to this incident, they had been acquitted in the said incident by the High Court.

15. After a close examination of the evidence on record, we are of the opinion that the evidence for recording the conviction of the appellant is not reliable and it could not be ruled out that dacoits had looted the licensed weapon kept by the informant in his house and as the police was unable to solve this case of double murder, in order to avoid criticism it had nominated the appellant and the acquitted co-accused only to show the case as solved and also in view of the differences with his neighbor Behari, the informant had taken advantage of the incident for implicating Bihari and his brother, the appellant Udaipal in this crime. The reasons for our views are as follows:

One, although the learned AGA feebly contended that no dacoities are normally committed at 4.30 p.m., but considering the clear prosecution evidence that a dacoity had indeed been committed in the house of the informant, when his licensed gun (whose particulars were specified) was looted along with some unspecified household items, the charge was also framed only u/s 396 IPC and the conviction was also recorded u/s 396 IPC, it is too late in the day for the learned AGA to contend at this stage that no dacoity had actually taken place and that this was a case of murder. We accordingly reject the said submission. Now if a dacoity had taken place in the house of the informant at 4.30 p.m. and most of the dacoits were unknown persons belonging to other villages, there was no reason for the appellant Udaipal and Bihari to have participated in this crime without taking any precautions to conceal their identities as they were neighbors. No evidence of any connection of the appellant and Bihari with the dacoits has been led, or even that the appellant and Bihari had criminal antecedents. Therefore there was little reason for the appellant to associate with the dacoits, who were said to belong to other villages for the purpose of committing this dacoity in broad day light in the house of their neighbor.

Two, it is significant to note that nothing was recovered from the appellant Udaipal, Bihari or the acquitted co-accused persons. Even the weapon which the miscreants are said to have carried away after the incident was never recovered. A "Gathari", (bundle) containing some ordinary clothes is said to have been found, but its recovery was not attributed to any of the accused, including the appellant.

Three, there appears to be no motive for the appellant to commit this crime. The so called murder in which PW-1 Jalim Singh and PW-3 Yadram are said to be witnesses had taken place 14-15 years earlier. Jalim Singh has even admitted that there was no dispute between the parties thereafter. Also PW-4 Matru has stated that Bihari and Bholey had even been acquitted by the High Court in the said case some years earlier. Then there would be no motive for the appellant to have participated in this incident along with some unknown dacoits who belonged to other villages. Significantly, so far as the appellant Udaipal was concerned, he was not said to have

been involved in the murder in which Bholey and Behari were made accused persons.

The other enmity for this crime suggested by the prosecution is even more incongruous. Thus, it is claimed that the police had conducted a raid a few days prior to this incident in which some dacoits had fled the spot, leaving their weapons behind, which had been seized by the police. The appellant Udaipal and co-accused Bihari are said to have threatened the informant Jalim Singh for being a Mukhbir of the police, but admittedly no application was given by the informant or Yadram against Bihari and the appellant Udaipal for the so called threat. No documentary evidence or evidence of public or police witnesses for corroborating these facts or for suggesting the existence of a real enmity between the appellant and Bihari on the one hand and the informant's side on the other, which could have been utilized for suggesting a motive for the appellant for commission of this grave crime, has been produced.

Four, if the motive suggested by the prosecution was correct, there was little reason for the appellant Udaipal and co-accused Bihari to have fired on Munna Lal, a nephew of the informant and Munshi Lal a cousin brother of the informant, who had no concern with the implication of Bholey and Bihari for some murder which had taken place 15 years back, in which the informant PW-1 Jalim Singh and his brother PW-3 Yadram were shown as witnesses. Moreover, P.W. 1 and P.W. 3 as per their version were chased by the miscreants who had committed the crime. If the motive for the murder as has been alleged was correct, then the accused persons would not have given up the chase and would definitely have attacked Jalim Singh and Yadram and not spared them.

Five, the FIR was also delayed which suggests that it was prepared after consultation and deliberation to implicate not only some unknown dacoits for this crime, but also the informant's next door neighbor, the appellant (and Bihari) with whom there were some differences. Notably, the informant had stated in his examination-in-chief that he had run away to the jungle in the course of the incident and thereafter had proceeded to the police station, yet the report was lodged after four hours and fifteen minutes at 8.45 p.m. when the incident had taken place at 4.30 p.m. at the police station which was 7 miles away. There is not satisfactory explanation for this delay.

Six, it is also significant to note that although on an analysis of the circumstances of this case, whereas a dacoity appears to be the cause of this crime, in which some witnesses had even identified the accused person, ironically those accused have been acquitted by the Trial Judge principally on the ground of delayed identification, but only the neighbors (i.e. the appellant and Bihari) who as we have already pointed out above were unlikely to have participated in this dacoity, along with the unknown miscreants without concealing their identities, have been convicted.

Seven, of the other two witnesses PW 4 Matru was admittedly a close relation of the informant and PW 2 Sohan Lal belonged to the same Biradari and they are said to have come from a distance of 200-250 yards to witness the crime and also to describe the manner in which the two deceased were shot dead inside the house, which only goes to suggest that they were tutored witnesses and their evidence additionally suffers from the same criticism as is applicable to the evidence of the informant PW-1 Jalim Singh and PW-3 Yadram, (the residents of the house).

16. On a consideration of all these circumstances, merely for the reason that two persons have been done to death in this case u/s 396 IPC of dacoity with murder, this Court cannot hastily affirm the conviction of the appellant, as it is well settled that hard cases should not be allowed to make bad law.

17. For the aforementioned reasons, we are of the view that the prosecution has not been able to establish the case against the appellant beyond reasonable doubt. Therefore, the judgment of the Trial Judge deserves to be set aside. The appellant is acquitted of the charges for which he has been convicted.

18. The appellant who is on bail need not to surrender to his bail. His bail bonds and sureties are discharged. Let the order and record be transmitted to the Court below for compliance. Appeal allowed.