

(2011) 07 JH CK 0059

Jharkhand High Court

Case No: Criminal Appeal No. 881 of 2002

Khadu Mahto

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision: July 6, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 161, 302, 394, 396

Citation: (2011) 4 JCR 220

Hon'ble Judges: Dilip kumar sinha, J

Bench: Single Bench

Final Decision: Allowed

Judgement

D.K. Sinha, J.

The instant appeal is directed against the judgment of conviction dated 19.10.2002 and order of sentence dated 22.10.2002 passed by the Additional Sessions Judge, F.T.C. - IV, Dhanbad in Sessions Trial No. 293 of 1997 by which the sole appellant was convicted u/s 396 of the Indian Penal Code and was sentenced to undergo rigorous imprisonment for 10 years in Govindpur (Barbadda) P.S. Case No. 61 of 2007, corresponding to G.R. No. 1102 of 1997 whereas co-accused were acquitted and the prosecution case was partly disbelieved.

2. The informant Tarun Yadav (P.W. 3) delivered his statement on 05.05.1997 in the mid night at about 1 a.m. near "Haryana Hotel" at Bara Jama. G.T. road within Barbadda Police Station. He narrated that in the night intervening 4/5.5.1997 while he was sitting at the "verandah" of his Transport Office and two trucks parked near the said office bearing registration No. A.P.-16U7363 and A.P. 27-T 6609 and the drivers as also the khalasi of the said trucks were sleeping in the cabins, several miscreants armed with deadly weapons such as iron rods, pistol, dagger and a bag in their hands suddenly appeared there and started assaulting the cleaners of the

trucks Raina Sonu and S.K. Karmulla with fists and slaps and forcibly took out Rs. 1100 and 6,000/- from the possession of each of the cleaners aforesaid. Consequently the informant, the drivers and the cleaners raised alarm and the people, who were present in Haryana Hotel also raised "holla". Then two of the culprits moved towards the "Haryana Hotel" and one of them exploded bomb at the gate of a P.C.O. which caused injury to the culprit who hurled. The owner of the Haryana Hotel then climbed over the roof of the Haryana Hotel and started pelting bricks and stones on the culprits. It is alleged that in retaliation another culprit after taking bag from the hands of injured culprit hurled another bomb on the roof which exploded and thereafter all the culprits escaped from the back side of the Hotel towards North. The witnesses went upstairs on the roof of the Hotel and found the owner of Haryana Hotel, Ramdhan Mahto in the pool of blood. He was dead sustaining injuries caused by splinters of the bomb. The occurrence took place for about 10 minutes and the informant narrated the features of the culprits in details to whom he claimed having seen in the light of bulb. On the statement of the informant Tarun Yadav, the case was registered under Sections 394/302, I.P.C. against 4 unknown culprits.

3. During course of investigation the complicity of six accused persons including the appellant Khadu Mahto appeared and that three of them namely Khadu Mahto (appellant), Ramjas Hazara, Somnath Singh were arrested and charge-sheet was submitted against these three u/s 396 of the Indian Penal Code showing the other two dacoits Manga Ram Gorai and Sudhir Hazara absconders pending investigation against Mani Singh. Later on the accused Manga Ram Gorai was also arrested and all the four namely Khadu Mahto. Ramjas Hazara. Somnath Singh and Manga Ram Gorai were put on trial by framing of charge against them u/s 396 of the Indian Penal Code. After criminal trial other three accused were, acquitted except the appellant Khadu Mahto, who was convicted u/s 396 of the Indian Penal Code and was sentenced to undergo rigorous imprisonment for a term of 10 years.

4. Mr. Shailesh, the learned counsel for the appellant submitted that as many as 9 witnesses were produced and examined on behalf of the prosecution but out of them P.W. 1 (Kasim Ansari), P.W. 2 (Aghanu Mahato). P.W. 6. (Shankar Mishra) and P.W. 7 (Tilak Mahato) were declared hostile, as they were unfavourable to the prosecution. The only material witness was P.W. 3 (Tarun Yadav) was the informant of the case and P.W. 5 (Tribhuan Mahto) i.e. the father of the deceased claimed having identified the appellant as the accomplice in the dacoity. Besides. P.W. 4 Dr. Vinod Kumar conducted autopsy on the body of Ramdhan Mahto and P.W. 9 Rahmat Karim Khan had investigated the case.

5. The learned counsel explained that the allegation of dacoity could not be substantiated as the persons alleged to be the victims of dacoity, from whose possession the miscreants removed the cash were not brought to the witness box. Neither the khalasis nor the drivers of the trucks or any other employee of the Hotel

or the Transport Agency could be produced and examined as the independent witness in this case.

6. The informant P.W. 3 Tarun Yadav reproduced the facts before the trial Court whatever he had narrated in his statement recorded by the police at the place of occurrence as his fardbayan. He deposed that the occurrence took place about a year ago while he was sitting in the Transport Office. Two trucks were parked opposite the said office and the drivers and the cleaners of the said trucks were sleeping in the cabins. He heard "halla" originating from the trucks and witnessed that the miscreants had been assaulting the cleaners and the drivers demanding money. The miscreants were armed with fire-arms and one of them was carrying "zhola" (bag). The neighbouring people of the Hotel also raised alarm and they started brick batting on the miscreants. The miscreants hurled bomb on the owner of Haryana Hotel Ramdhan Mahto and then escaped. He along with others climbed over the roof of the hotel and found Ramdhan Mahto dead sustaining injuries from the splinters of the bomb hurled by the miscreants. The police arrived at the place of occurrence in the night and recorded his statement and he put his signature. In the cross-examination he admitted being the outsider, as such, not in a position to recognize the people of that District. He was the employee in the Transport Agency. He disclosed the name of the owner of the Transport Agency and other employees. He admitted having not touched or peeped inside the bag which was carrying bomb. He visited Barbadda Police Station to inform the occurrence to the Police where he came to learn that the Officer-in-Charge had gone out in patrolling and thereafter he returned back to the place of occurrence where the police came and recorded his statement. The witness testified in clear words that since he did neither recognize any of the culprits nor did he recognize anyone by his name, as such he did not disclose the name of any of the culprits in his statement before the police, yet, he claimed that the culprits were about 4/5 participating in dacoity. He identified his signature on his statement.

7. P.W. 4 Dr. Vinod Kumar an Associate Professor in the Forensic Medicine Department at Patliputra Medical College, Dhanbad had held autopsy on the body of Ramdhan Mahto on 05.05.4997 at Patliputra Medical College, Dhanbad and found the following:

(i) rigour mortis present in all his four limbs.

(ii) Ante-mortem injuries on various parts of the body and in his opinion death was due to haemorrhage and shock on account of injuries on the face besides on the other parts of body caused by, explosion of bomb. He proved the postmortem report Ext. 2. In the cross-examination, the witness admitted that such injuries were possible on the face and other parts of body on account of explosion during its manufacture. The fact could not be demolished in his evidence that the victim died of sustaining injuries on his face and other parts of body caused by explosion of bomb and that no part of his body was blown off.

8. The next important witness was P.W. 5 Tribhoven Mahto, the father of the deceased and Hotel Keeper of Haryana Hotel. The witness testified that the occurrence took place some 15 months ago in the mid night at about 12.30 to 1.00 a.m. He was there in his Hotel and was about to return to his home, which was situated at the distance of about 4/5 hundred yards from the Hotel. In the meantime, there held commotion near Ram Gopal Transport Agency and the drivers of the vehicle were raising alarm. Responding to such alarm he along with other also raised alarm and they approached the place of occurrence where "dacoity" was being committed. He confronted with the dacoits, who asked him to return back lest he was threatened to be killed and therefore, he and other witnesses retreated but some of the witnesses climbed on the roof as they were being chased by the dacoits. He testified further that one of the dacoits Khadu Mahto hurled bomb on the shutter of telephone booth which caused explosion and Khadu Mahto himself sustained injuries from the splinters of bomb. Thereafter another miscreants snatched the bag containing bomb from the possession of Khadu Mahto (appellant) and hurled on the roof which caused injury on the face of Ramdhan Mahto and on the other parts of his body as a result of which he died on the roof itself. He went on the roof and found his son Ramdhan Mahto dead but in the meantime the dacoits escaped. He Identified the accused Ramjas Hazara and Khadu Mahato in the dock. During his cross-examination the witness claimed having seen the dacoits from behind the truck who hurled bomb. The witness clarified that on alarm of dacoity he proceeded with other witnesses towards Transport Agency and amongst them were Aghnu Mahto and Kashmali Mian but he could not name the other witnesses. The culprit Khadu Mahto to whom he claimed to identify belonged to village Muddadiah. His statement was recorded before the Magistrate after about a month of the occurrence. The witness further admitted that he was implicated 25 years ago in a dacoity case falsely along with others. The witness admitted that he could not come across the police in the night of occurrence and he did not know as to by whom the case was instituted. He had occasion to see police when he came to his house with the dead body of his son. He admitted that on his instance his statement was recorded before the Magistrate and that he was brought by the police in the Court for recording of his statement. On recall of this witness on behalf of the prosecution he testified that he did not recognize the miscreant by whom the bag (containing bomb) was snatched from the hands of Khadu Mahto who hurled bomb on the roof. Yet, he did not remember as to whether it was moonlit night or dark night when the occurrence took place.

9. P.W. 6 Shankar Mishra and P.W. 7 Tilak Mahto were declared hostile. P.W. 8 Dr. Subhash Chandra Manjhi had examined Khadu Mahto (appellant), son of late Motilal Mahto of Murrahadih, P.S. Barwadda on the requisition of the police white the witness was posted as the Incharge of the Primary Health Centre, Govindpur on 09.05.1997 at 9.30 a.m. and found the following injuries:

(i) The black charring wound on the right forearm and, right thumb with blister.

- (ii) The black charring wound of different sizes on the right of abdomen and chest.
- (iii) The black charring wounds on the left thigh and left leg of different sizes,
- (iv) The multiple black charring wounds on the right thigh and right leg of different sizes.
- (v) A black spotted wound on the left side of the cheek.
- (vi) A black spotted wound on the front side of the neck, wound mark on the bridge of the nose.

The Doctor determined the age of the injuries within 5 days, simple in nature appeared to be caused by burn due to explosive substance. He proved the injury report Ext. 3. In the cross-examination the witness admitted having not mentioned the grounds for determining the age of the injuries within 5 days but it could be within 10/15 days.

10. P.W. 9 Rahmat Karim Khan was the Investigating Officer of the case. He testified having visited the place of occurrence in the night itself near Haryana Hotel and came to learn that the owner of Haryana Hotel succumbed his injuries caused by explosion of bomb which was hurled by the miscreant. He recorded the statement of the informant Tarun Yadav at the place of occurrence. The investigation of the case was assigned to him, as such, recorded restatement of the informant and examined the place of occurrence got the inquest report of the deceased prepared by A.S.I. Ram Kumar Singh, who had accompanied him. He seized blood stained splinters of bomb including some small pieces of paper from near the dead body and some splinters of bomb lying opposite the S.T.D. booth in presence of the witnesses and prepared seizure list. His attention was drawn at length towards the statements of the hostile witnesses. He admitted having arrested the appellant Khadu Mahto on 09.05.1997 from his matrimonial home "Ghatatarn" and at that time he was having injuries on the different parts of his body. Khadu Mahto was brought before the doctor of Primary Health Centre, Govindpur on the same day on 09.05.1997 where he was medically examined on his requisition (Ext.6). The I.O. further testified in the cross-examination that though he stayed at the place of occurrence with the police party for about 7 hours but, none of the witnesses had disclosed the name of the miscreants who had participated in the commission of dacoity. He further testified that he had recorded the statement of 9 witnesses at the place of occurrence but none of them admitted the presence of Tribhuwan Mahto at the time and place when dacoity took place. Tribhuwan Mahto in his statement recorded u/s 161 had narrated that he was threatened by the miscreants that he would be killed in case of raising alarm but he had not narrated that he come across the miscreants. I.O. admitted having not put question to Tribhuwan Mahto as to where he was for long 7 hours in spite of the fact that his son had succumbed injuries. Besides, the statements of the employees of the Hotel were recorded in the night itself but none of them had disclosed that Tribhuwan Mahto

was present.

11. Mr. Shailesh, learned counsel appearing for the appellants submitted that prosecution of the appellant Khadu Mahto was based upon speculation and none of the witnesses, produced on behalf of the prosecution admitted the presence of P.W. 5 Tribhuwan Mahto at the time and place of occurrence. The death of Ramdhan Mahto, Son of P.W. 5 Tribhuwan Mahto was not denied, caused on account of sustaining injuries with the splinters of bomb. The other witnesses supported the occurrence of dacoity which resulted into killing of Ramdhan Mahto. The other witnesses such as the drivers and the cleaners of the trucks who were the alleged victims of the dacoity were abstained from the witness box during trial. None of the witnesses except Tribhuwan Mahto claimed having identified the dacoits. The informant in his statement recorded by the police at the first instance had given detailed description of the specific features of the dacoits with specific identification mark but no question was put to the informant as to whether the appellant Khadu Mahto, who was present in the dock participated in the alleged dacoity. The informant specifically stated that all the miscreants were within the range of 25-30 years but the age of Khadu Mahto was assessed about 38 years by the Trial Judge when the judgment was delivered. The informant Tarun Yadav testified that the miscreants, who was carrying bag hanging with his shoulder was having an old scar of wound below his eye and in spite of such specific identification mark having found on the body of the dacoit who hurled bomb. The informant Tarun Yadav was silent that he identified the appellant who was having similar feature or that the appellant was not amongst the dacoits.

12. Learned counsel Mr. Shailesh assailing the evidence of solitary eye-witness P.W. 5 Tribhuwan Mahto submitted that his presence either at the place of occurrence where dacoity was committed or on the roof of Haryana Hotel where his son was lying in the pool of blood sustaining injuries was not admitted by any other witness. The police stayed at the place of occurrence for about 7 hours, recorded the statement of the informant and other witnesses, prepared the inquest report and took away the dead body for its postmortem examination but P.W. 5 did not admit his presence at that place and there was no explanation as to where he had gone during stay of the police at the place of occurrence for 7 hours. The other witnesses though supported the occurrence but did not identify the appellant Khadu Man to being one of the dacoits participating in the alleged dacoity whereas the witness P.W. 5 Tribhuwan Mahto testified that when he was chastised by the miscreants he hide himself behind the "Tyres" of the truck opposite the Transport Agency and from there he witnessed the bomb being hurled from the premises of Haryana Hotel which was quite unnatural and his evidence was not reliable and fit to be disbelieved, but the learned Trial Judge relying upon the statement of P.W. 5 Tribhuwan Mahto convicted the appellant for the charge u/s 396 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for 10 years which needed interference.

13. Concluding his argument Mr. Shailesh submitted that the appellant was highly prejudiced for not being confronted with the incriminating materials while recording his statements u/s 313 Code of Criminal Procedure. The questions were simple which was put to him that in the night of 5th May, 1997 at about 12.30 O'clock, he committed dacoity conjointly at Haryana Hotel, Badajamua at the G.T. road and committed murder of Ramdhan Mahto by exploding bomb. Mr. Shailesh asserted that there was no such incriminating material against the appellant on the record during trial to call upon the appellant to explain and for this reason he was highly prejudiced. He was confronted with such material which was though not against him, but was convicted on the basis of such material. It was not the allegation that this appellant had exploded bomb, rather it was exploded by some other miscreant and this fact has been admitted by P.W. 5 Tribhuwan Mahto when his attention was drawn by the prosecution in his re-examination. The entire allegation was false and concocted against the appellant. His attention was not drawn in his examination u/s 313. Code of Criminal Procedure as to the cause of injuries found on his person so as to co-relate and corroborate the evidence that it were allegedly caused when he exploded the bomb at the shutter of the telephone booth.

14. Heard Mr. Ravi Prakash, A.P.P. appearing on behalf of the State-Opposite Party. The learned counsel for the petitioner submitted that conviction of an accused can be sustained on the basis of solitary eye-witness if his testimony was reliable, trustworthy and inspired confidence.

15. He further explained that P.W. 5 Tribhuwan Mahto during his examination and cross-examination at length fairly established that the appellant Khadu Mahto was one of the dacoits, who during course of dacoity committed murder of his son conjointly. He stood to the test of cross-examination and admitted that another accused took out the bag from the hands of the appellant Khadu Mahto and hurled bomb on the roof, consequently his son died of sustaining splinters caused by explosion of bomb. Learned Trial Judge meticulously dealt with all aspects and having been satisfied with the statement of the solitary eye-witness convicted the appellant and acquitted the other accused.

16. Having regard to the facts and circumstances, argument advanced on behalf of the parties, I find substance in the argument of the learned counsel for the appellant Mr. Shailesh that the prosecution failed to prove the case as against the appellant Khadu Mahto beyond the shadow of all reasonable doubts. The conviction of the appellant is based upon the testimony of the solitary eye-witness P.W. 5 Tribhuwan Mahto but a reasonable suspicion has been raised about the presence of this witness at the relevant time and place of occurrence, for the reason of course that none of the prosecution witnesses supported the presence of this petitioner either at the place where dacoity was committed or at near Haryana Hotel when one of the miscreants hurled bomb on the roof where his son was standing, who sustained injuries caused by the splinters of bomb and died. Even during visit and

stay of the police for long 7 years at the place of occurrence where, besides doing other formalities, statement of the informant was recorded, P.W. 5 was not found there and no reasonable explanation was given by him as to where he was during such period and why not he disclosed the complicity of this appellant at the first instance before the Police. I further find that this witness did not disclose the name of the appellant when the police visited his house to return the dead body of his son after autopsy was done. The second important point to which I find substance that this appellant was not confronted with the incriminating materials appearing against him as discussed here-in-above in the argument of Mr. Shailesh, the learned counsel for the petitioner which prejudiced the defence and that the prosecution failed to explain the injuries found on the person of the appellant and further explaining the cause of such injuries. In that manner the appellant was denied fair and proper opportunity of explaining circumstances appearing against him and for such reason his conviction would be bad in law.

17. In the facts and circumstances, I find that the prosecution failed to establish the complicity of the appellant in the alleged dacoity beyond reasonable doubt and the learned Trial Judge failed to appreciate the points discussed here-in-above while recording the judgment. For the reasons stated above, I find that the conviction of the appellant cannot be sustained under law. Accordingly, the appellant Khadu Mahto, who has been admitted to bail by the order dated 30.09.2003 during tendency of this appeal is acquitted from his conviction u/s 396 of the Indian Penal Code and accordingly sentence awarded against him is set aside in Sessions Trial No. 293 of 1997 arising out of Govindpur P.S. Case No. 61 of 1997, corresponding to G.R. No. 1120 of 1997 and his bail bond stands discharged.

18. Accordingly, this appeal is allowed. Appeal allowed.