

(2017) 01 MP CK 0082
MADHYA PRADESH HIGH COURT
Case No: 165 of 2009

Babloo @ Bhoora

APPELLANT

Vs

State of M. P.

RESPONDENT

Date of Decision: Jan. 17, 2017

Acts Referred:

- Code of Criminal Procedure, 1973, Section 27, Section 374 - Jurisdiction in the case of juveniles - Appeals from convictions
- Indian Penal Code, 1860, S

Hon'ble Judges: G.S. Ahluwalia

Bench: Single Bench

Advocate: R.K.S. Kushwah, R.D. Agarwal

Final Decision: Allowed

Judgement

1. This appeal under Section 374 of Cr.P.C. has been filed by appellant Bablu @ Bhura against the judgment and sentence dated 5-11-2008 passed by Special Judge, Datia in Special Case No. 70/2007, by which the appellant has been convicted under Section 397 of I.P.C. read with Section 13 of M.P.D.V.P.K. Act and has been sentenced to undergo the rigorous imprisonment of 7 years with fine of Rs. 5,000/- with default imprisonment. By the same judgment, two persons namely Ravikant and Hargovind, were acquitted by the Trial Court.

2. The undisputed fact is that the place of incident, i.e., Chirgaon-Bhander Road, bridge of Vichhodana Canal has been notified as Dacoity effected area by notification No. F- 12-1/2000/B(1) dated 24-1-2000.

3. The necessary facts for the disposal of the present appeal are that on 21-1-2007 at about 12 P.M., the complainant Ramprakash Gupta and Mohanlal Sharma were

going to Jhansi by their Maruti Car for taking orders for silver ornaments. On the way, near the bridge, one Tractor Trolley which was loaded with food grains was parked in an out of order condition, and on the other side, two persons were standing. The moment, complainant Ramprakash Gupta tried to take his car by the side of the persons, they stopped the car. As soon as the car stopped, one person took out a country made pistol and forced the complainant to get down from the car. They took out an amount of Rs. 7,000 which was kept in his pocket, driving license and also took away Nokia Mobile Model 3315, which was having Airtel Sim. The remaining two persons took the search of Mohanlal Sharma who was sitting in the car, and took away near about 7 kg of silver which was kept in the blue colored bag. Thereafter the three accused persons after taking the entire cash amount, driving license, Mobile Phone and the silver escaped on their motor cycles.

4. A F.I.R. was lodged by Ramprakash Gupta in Police Station Bhandar. On the basis of said F.I.R., the police started investigation. Spot map was prepared. The statements of Ramprakash Gupta and Mohanlal Sharma were recorded. The accused persons were arrested. On the basis of discloser statement of Bablu @ Bhura, Nokia Mobile handset of 3315 model, Driving license of Ramprakash Gupta were seized by seizure memo Ex. P/7. Thereafter, a charge sheet against three persons namely, the appellant Bablu @ Bhura, Ravikant and Hargovind was filed for offences punishable under Sections 392, 120B of I.P.C. read with Section 11,13 of M.P.D.V.P.K.

5. The Trial Court framed charges under Sections 397 of I.P.C. read with Section 13 of M.P.D.V.P.K. Act. The accused persons abjured their guilt and pleaded not guilty.

6. The prosecution in order to prove its case, examined Onkar (P.W.1), Mohan Sharma (P.W.2), Ramprakash Gupta (P.W.3), Ahiwaran Singh (P.W. 4), Anaadi Mishra (P.W. 5), Mahendra Singh Yadav (P.W. 6), K.L. Magraiya (P.W. 7), Janaki Prasad (P.W. 8), Anurudh Singh (P.W. 9), and K.S. Gurjar (P.W. 10). The appellant did not examine any witness in his defence.

7. Onkar (P.W.1) has not supported the prosecution case and was declared hostile. He was cross examined by the Public Prosecutor however, nothing could be elicited in favor of the prosecution from his cross examination.

8. Mohan Sharma (P.W. 2) has narrated the entire incident, but he has stated that at the time of the incident, the accused persons had covered their cases and did not indentify the accused persons including the appellant in the Court. He was declared hostile on the question of identity of the accused persons. In cross examination, this witness specifically stated that the accused persons present in the Court are not the assailants and they have not committed the offence.

9. Ramprakash Gupta (P.W. 3) after pointing out towards the appellant said that he knows him and also stated that the other accused persons are also known to him. On 21-1- 2002 at about 12 P.M. he was going to Jhansi. Mohan Sharma was also with

him. He found that one tractor was parked in the middle of the road in an out of order condition. The moment, this witness tried to take his car by the side of the tractor, one of the accused person snatched the key of the car after pointing his country made pistol on his head . Another accused took the mobile phone, Rs 7,000 and driving license from his pocket. All the three persons had covered their faces, therefore, he could not see their faces. One of the accused took away 7 kg of silver which was kept in the car. Rs. 200 from the pocket of Mohan Sharma were also taken out. Thereafter this witness came to Bichhona Police Outpost. The F.I.R. Ex. P.2 bears his signatures. Spot map Ex. P.3 was prepared which bears his signatures. This witness in cross examination specifically stated that the other co-accused persons namely Ravikant and Hargovind were not present on the spot and they have not committed the offence. However, it was specifically stated that the appellant was there and he had committed the offence. In cross examination, this witness admitted that earlier he had never seen the appellant and he is seeing the appellant for the first time in the Court. No Test Identification Parade was got done by the Police. Again he admitted that the assailants had covered their faces and only the hairs of their head were visible. He further stated that today he has identified the appellant because of style of his walking and the scalp hairs. Further admitted that the style of walking and the scalp hairs of all the persons is almost the same. He further admitted that at the time of preparation of spot map, he had pointed out the place where the tractor and trolley were parked but the same has not been shown in the spot map.

10. Ahivaran Singh (P.W. 4) did not support the prosecution case and was declared hostile. He was cross examined by the Public Prosecutor however, nothing, in favor of the prosecution, could be elicited from his cross examination.

11. Anaadi Mishra (P.W. 5) had taken the report from Police Out Post Vichhodana to the Police Station Bhandar for its registration.

12. Mahendra Singh Yadav (P.W. 6) has stated that the about a year back, the police had interrogated the appellant who had disclosed that the Mobile Phone and the driving license are kept in his house. The Memorandum is Ex. P.6. In front of him, the police had seized one Mobile Phone of 3315 model and one driving license of Ramprakash Gupta from the possession of appellant. The seizure memo is Ex. P.7. In cross examination this witness has stated that he was standing out his room which is situated in front of the police station Bhandar. His brother had taken the room on rent and he was residing with his brother. However, he could not disclose the name of the landlord and the amount of rent. He further stated that he was called by one Constable and when he reached to the police station there were 1-2 police personals and he was informed that he has to accompany them to kalpi. Near about 5-6 police personals went to Kalpi but he could not disclose their names. This witness also could not tell that by which vehicle he went to Kalpi. He further stated that the moment, he reached the police station, he was asked to go to Kalpi and the entire

paper work was done in the police station after returning back from Kalpi. This witness has further stated that he had gone to Hariganj Colony in Kalpi where the house of the appellant is situated. He had also gone inside the house, however, could not tell that how many rooms were there in the house. He also could not see that whether there was any window in the room or not? He also could not tell that in which direction the door of the house was situated. The seized articles were brought by the appellant from inside the room. This witness could not tell that whether any other member of the family was present or not. He has merely stated that the door of the house was opened.

13. K.L. Magraiya (P.W. 7) has stated that he had recorded the statements of Ahivaran and Onkar Singh and had not added or deleted. Co-accused Ravikant and Hargovind were arrested on 23-2-2007 and the arrest memo are Ex. P.8 and P.9.

14. Janaki Prasad (P.W.8) has stated that Ramprakash Gupta had lodged a complaint in the police outpost Vichhodana about the loot of Rs. 7,000, 7 kg of silver, mobile phone and driving license. He had also mentioned in the complaint, that he can identify the assailants. This witness had also written the F.I.R. Ex. P.2 which was sent to Police Station Bhandar for its registration. In cross examination, this witness has stated that along with Ramprakash, his servant Mohan Sharma had also come. The spot map Ex. P.3 is in his handwriting and was signed by A.S.I.Gurjar. The place where the tractor was parked is not shown in the Spot map as the same was not dictated by Shri Gurjar.

15. Anurudh Singh (P.W.9) has stated that he had registered the F.I.R. Ex. P.2.

16. K.S. Gurjar (P.W.10) has stated that at the instance of the complainant Ramprakash, he had prepared the spot map. On 6-7-2007, the appellant was arrested vide arrest memo Ex P.10. The appellant had made a discloser statement that he has kept the mobile phone and the driving license of the complainant in Kalpi. His memorandum under Section 27 of Cr.P.C. is Ex. P.6. On production of the mobile phone of 3315 model and driving license of Ramprakash, by the appellant, the same were seized by seizure memo Ex. P.7. This witness in cross examination has stated that the seizure witnesses were already present in the Police Station and he cannot say that why they had come to the Police Station. This witness has stated that after reaching Kalpi they did not inform the local police. When they reached to the house of the appellant, the doors of his house were opened. He further admitted that no sample of seal was affixed on the seizure memo. He also admitted that in the spot map, the place where the tractor trolley were parked have not been shown. He further admitted that he had not interrogated the persons of the nearby place about the incident. He further stated that although the accused persons were got identified from the complainant but nothing was reduced in writing.

17. The moot question is that whether the identification of the accused and the identification of articles seized from the appellant has been proved beyond

reasonable doubt or not?

18. The Supreme Court in the case of Prakash Vs. State of Karnataka ((2014) 12 SCC 133) has held as under :

"An identification parade is not mandatory nor can it be claimed by the suspect as a matter of right. The purpose of pre-trial identification evidence is to assure the investigating agency that the investigation is going on in the right direction and to provide corroboration of the evidence to be given by the witness or victim later in court at the trial. If the suspect is a complete stranger to the witness or victim, then an identification parade is desirable unless the suspect has been seen by the witness or victim for some length of time. In Malkhansingh v. State of M.P. (2003) 5 SCC 746) it was held as under :

"7. ... The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact."

Thus, holding of Test Identification Parade during investigation is desirable but merely the Test Identification Parade was not held, it would not mean that the identification of the accused in the Court will not be admissible. In fact the dock identification in the Court is the substantive piece of evidence. However, whether the identification of the accused in the Court should be relied upon or not, will depend upon the other circumstances so proved by the prosecution.

19. From the appreciation of the evidence, which has been led by the prosecution, it is clear that after the appellant was arrested, Test Identification Parade was not conducted by the police. Even the articles which were seized from the appellant were not put for Test Identification. Even the seized articles were not produced before the Court and the driving license or the mobile phone were not identified in the Court. Further, it is clear from the evidence of Mohan Sharma (P.W. 2) and Ramprakash Gupta (P.W. 3) that at the time of the incident, all the three assailants had covered their faces. Only their scalp hairs were visible. Ramprakash (P.W. 3) has identified the appellant in the Court only on the basis of style of his walking and his scalp hairs. However, he admitted that the style of walking and scalp hairs of various persons are same. When the complainant Ramprakash (P.W. 3) could not see the faces of the assailants, then it was not possible for him to identify the appellant for

the first time in the Court. In view of the admission of Ramprakash Gupta (P.W. 3) that the face of the appellant was covered at the time of the incident, and he could identify the appellant only from the style of his walking and his scalp hairs, the identification of the appellant in the Court becomes doubtful and unreliable.

Therefore, this Court is of the view that the prosecution has failed to prove the identification of the appellant by Ramprakash Gupta (P.W. 3).

20. Next question is with regard to the seizure and identification of incriminating articles from the possession of the appellant.

21. Mahendra Singh Yadav (P.W.6) is the independent seizure witness. He has stated that his brother has taken a room on rent, which is situated in front of the Police Station, and he had come to the room of his brother, but, could not disclose the name of the landlord of the room. Further he could not tell that what is the rent of the room. This witness is the resident of village Khiriya Khoudas, P.S. Dursada, Distt. Datia, therefore, his presence in Bhandar was not natural. Further, according to this witness, he went to the police station as he was called by a police constable, whereas K.S.Gurjar (P.W. 10) has stated that the seizure witness was already present in the Police Station and K.S. Gurjar (P.W. 10) could not say that why and for what reason, the seizure witness had come to the police station. Mahendra Singh Yadav (P.W. 6) could not say that by which vehicle he went to Kalpi. He also could not say that whether there were any family members of the appellant in the house at Kalpi or not? He also could not point out that in which direction, the main door of the house was situated. From the evidence of Mahendra Singh Yadav (P.W. 6), it appears that he had not gone to Kalpi and nothing was seized from the possession of the appellant in the presence of this witness. Further, this witness has stated that no paper work was done at Kalpi and every paper work was done in the Police Station after returning back from Kalpi whereas K.S. Gurjar (P.W. 10) has stated that the seizure memo was prepared in Kalpi itself and not in the police station. The prosecution has not produced any rojnamcha sanha to show the departure of police party for Kalpi and its arrival back to the Police Station Bhandar. Further according to K.S. Gurjar (P.W.10), the articles were sealed on the spot but, no sample of seal has been affixed on the seizure memo. Thus, from appreciation of the evidence and considering the vital contradictions in the evidence of Mahendra Singh Yadav (P.W. 6) and K.S. Gurjar (P.10), this Court is of the view that the prosecution has failed to prove the seizure of Mobile Phone of 3315 model and the driving license of Ramprakash Gupta from the possession of the appellant. Further these articles were not put for Test Identification during the investigation. Even the said articles were not produced before the Trial Court and these articles were not got identified in the Court. Therefore, there is no substantive evidence to prove the identification of the articles, allegedly seized from the possession of the appellant. In absence of identification of the seized articles as well as the cogent and convincing evidence with regard to the seizure of the articles, this Court is of the considered view that

the prosecution has failed to prove that Mobile Phone of 3315 model and driving license of Ramprakash Gupta, were seized from the possession of the appellant.

22. When the prosecution has failed to prove that the appellant was one of the assailant by proving his identity beyond reasonable doubt, and when the prosecution has failed to prove that any incriminating articles were seized from the possession of the appellant, then this Court is left with no other option but to hold that the prosecution has failed to prove the charges under Section 397 of I.P.C. and under Section 13 of M.P.D.V.P.K. Act. Accordingly, the judgment and sentence passed by the Trial Court are set aside. The Appellant is acquitted of the charges under Sections 397 of I.P.C. and under Section 13 of M.P.D.V.P.K. Act.

23. The appellant be released forthwith in this case.

24. This appeal succeeds, and is hereby Allowed.

25. The copy of this Judgment be send to the Trial Court along with the record for necessary information and compliance.