

AFR

Reserved on 5.9.2017

Delivered on 5.12.2017

Case :- CRIMINAL APPEAL No. - 7946 of 2008**Appellant :-** Nahar Singh and Nihal Singh**Respondent :-** State Of U.P.**Counsel for Appellant :-** Shri Ram Rawat, Brijesh Sahai, Deepak Kumar Pandey, Giri Ram Rawat, H.L. Pandey, N.L. Pandey, Rajiv Kumar Singh, Rajul Bhargava, Shiv Kant Awasthi, Sudeep Pathak**Counsel for Respondent :-** Govt. Advocate, S.N. Tiwari**connected with****Case :-** CRIMINAL APPEAL No. - 7988 of 2008**Appellant :-** Pappu @ Ram Prakash, Sukh Ram and Netra Pal**Respondent :-** State Of U.P.**Counsel for Appellant :-** Shri Ram Rawat, Deepak Kumar Pandey, Giri Ram Rawat, Shiv Kant Awasthi, V.P. Srivastava**Counsel for Respondent :-** Govt. Advocate, S.N. Tiwari**Hon'ble Ramesh Sinha, J.****Hon'ble Aniruddha Singh, J.****(Delivered by Hon'ble Aniruddha Singh, J.)**

1. Heard Mr. Deepak Kumar Pandey, learned counsel for the appellants and Sri I.P. Srivastava, learned A.G.A. for the State. Learned counsel for the complainant is not present though the matter has been revised.

2. Both the appeals have arisen out of the same judgment and order, hence they were heard together and are being decided by common judgment.

3. Appellants Nahar Singh and Nihal Singh filed Criminal Appeal No. 7946 of 2008 and Pappu @ Ram Prakash, Sukh Ram and Netra Pal filed Criminal Appeal No. 7988 of 2008 against impugned judgment and order dated 15.11.2008 passed by Special Judge (D.A.A. Act)/Additional Sessions Judge, Court No.7, Agra in Session Trial No. 01 of 1997, Case Crime No. No. 350 of 1996, Police Station Khandauli, District Agra convicting appellants under Section 396 IPC and sentencing them

to imprisonment for life with fine of Rs. 5,000/- each, in default of payment of fine, five months' additional simple imprisonment.

4. The case of prosecution in short is that on 17.10.1996 at 11:30 P.M. 10-12 miscreants armed with gun, pistol, knife and danda scaled the boundary and entered into the house of informant Saheb Singh in village Nagla Neem, Mauja Semra, Police Station Khadauli, District Agra and they started assaulting the informant and his family members with the intention to commit dacoity. The informant went out from the house and started screaming. On hearing the alarm villagers Roshan Lal, Het Ram, Nawab Singh and others reached the spot with torch and identified the accused Nahar Singh, Nihal Singh, Pappu @ Ram Prakash, Sukh Ram and Netra Pal in the torch light and 'Argan'. One Smt. Mano Kumari @ Manwati died in the incident after sustaining gunshot injury and Raje Singh, Bani Singh, wife of Bani Singh and few villagers got injured and received pellet injuries. The assailants looted clothes and jewellery and fled away.

5. On the basis of written report Ex. Ka-1, the FIR(Ext. Ka-15) was lodged and chik report was prepared on 18.10.1996 at 2:05 a.m. Six empty cartridges of 12 bore and three empty cartridges of 315 bore were recovered from the place of incident and recovery memo of the same was prepared as Ext. K-2. The recovery memo of simple soil and bloodstained soil (Ext. Ka-3) was prepared. Post mortem report of Smt. Manwati(EXT.-4) and injury reports of Smt. Sone Devi(Ext. Ka-5), Bani Singh (Ext. Ka-6), Rajendra Singh (Ext. Ka-7) and Padam

Singh (Ext. ka-8) are on record. Panchnama (Ext.Ka-9), Form 33 (Ext.Ka-10), Photolash (Ext. Ka-11) and Site plan with index(Form 13) were prepared. Police submitted charge sheet against Nahar Singh, Nihal Singh, Pappu @ Ram Prakash, Sukhram Singh and Netrapal under Sections 396/376 IPC and case was committed to the Court of Session for trial and it was transferred to Court concerned.

6. Charges have been framed under section 396 IPC by the Special Judge(D.A.A.), Room No. 7, Agra on 12.2.2004 against Nahar Singh, Nihal Singh, Pappu @ Ram Prakash, Sukh Ram and Netrapal. Accused denied charges and prayed for trial.

7. The prosecution in support of its case examined Charan Singh(P.W.-1), Sahab Singh(P.W.-2), Basanti Devi(P.W.-3), Smt. Sone Devi(P.W.-4), Bani Singh(P.W.-5), Rajendra Singh(P.W.6), K.N. Pandey (P.W.-7), Dr. P.C. Chaturvedi(P.W.-8) and Dr. V.K. Singh(P.W.-9).

8. After closing evidence of prosecution, statements of accused have been recorded under Section 313 Cr.P.C. They have denied charges and specifically stated that witnesses are interested and family members of the informant and the witnesses deposed falsely against them due to enmity. Earlier, a false FIR was lodged by the informant against the accused appellants under Section 307 IPC in which they have been acquitted. This FIR has also been falsely lodged. They examined one witness Mohan Singh as DW-1 in their defence.

9. The trial Court after hearing both sides on merit of the case and after apprising facts and evaluating the testimony on record, recorded conviction against the

accused persons and sentenced them accordingly. Consequently this appeal.

10. The prosecution produced witnesses of fact P.W.-1 Charan Singh who was an independent witness, was declared hostile as he did not support prosecution case, P.W.-2 Sahab Singh (informant), P.W.-3 Basanti Devi(wife of informant), P.W.-4 Smt. Sone Devi(wife of informant's brother), P.W.-5 Bani Singh(brother of informant), P.W.-6 Rajendra Singh(brother of informant) and other formal witnesses.

11. This Court after scanning the evidence on record has to adjudicate whether the prosecution has proved charges levelled against accused persons beyond reasonable doubt or not.

12. Word 'proved', 'disproved' and 'not proved' are defined under Section 3 of Evidence Act as under:-

"Proved".-A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

"Disproved".-A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist."

"Not proved".- A fact is said not to be proved

when it is neither proved nor disproved.

13. The prosecution has produced six witnesses of fact. P.W.1 turned hostile, P.W.-2 is informant and P.W.-3 to P.W.6 are family members of the informant. Hence they are interested and partisan witnesses. Thus the Court has to adopt careful approach in analyzing the evidence of such interested witnesses in the light of the judgment of the Supreme Court in the case of **Santosh Devidas Bahade vs. State of Maharashtra 2009(4) Supreme 380.**

14. The question is whether a prudent man under these circumstances can believe that the facts deposed by the witnesses do exist.

15. It is admitted by all the witnesses that accused are neighbours of the informant as well as the prosecution witnesses i.e. P.W.-2 to P.W.-6 and there is only gap of 5ft. Gallery between the houses of accused and the informant. All the witnesses admitted this fact in their cross- examination. All the witnesses have also admitted that there had been litigation of 'marpeet' between them and in that case accused have been acquitted. They have also admitted that all the prosecution witnesses are family members.

16. P.W.-2 has lodged F.I.R. naming five accused and stated their names in his examination-in-chief as well as in statement under Section 161 Cr.P.C. P.W.-3 to P.W.-6 have not stated names of five accused in their statements under Section 161 Cr.P.C. but deposed in their statements before the Court. Hence, statements given by P.W.2 to P.W.6 on this point amount to improvement. Hence, these statements have no

significance as it was held by the Apex Court in the case of **Rudrappa Ramappa Jainpur & others vs. State of Karnataka(2004) 7 SCC 422**. Hon'ble Supreme Court in paragraph 16 observed that on failure of prosecution witnesses to mention in statement under Section 161 about involvement of accused, their versions would not be reliable insofar as they relate to the involvement of that accused. Relevant portion of paragraph 16 of said judgment is quoted as below:-

“Of the several witnesses examined on this aspect of the matter, PWs. 3, 4, 5, 6 and 8 do not ascribe any role to A-9. PW-2 did not mention his name in the course of investigation and for the first time while deposing in Court Stated that he was exhorting his accomplices to finish the deceased. Similarly PW-7 deposed that A-9 was exhorting his accomplices to finish the deceased but as stated by the Investigating officer, PW-46, he had not said so in the course of investigation when his statement was recorded under Section 161 Cr. P.C. So far as PWs. 9 and 10 are concerned, the story that they had been called by A-9 who disclosed to them their intention of assaulting the deceased does not find place in their statements recorded under Section 161 Cr. P.C. as deposed to by the Investigating officer, PW-46. This part of the story was for the first time narrated by them in the course of their deposition. The trial court has considered these discrepancies in the

testimony of the above mentioned witnesses. It held that the presence of PW-7 was doubtful because she being the daughter-in-law of PW-2, she would not have omitted her name from the First Information Report when she mentioned the presence of so many other witnesses. In any event as earlier noticed, PW-7 in her statement recorded in the course of investigation did not mention about exhortation by A-9. For the same reason we find the versions of PW-2, PW-9 and PW-10 not reliable in so far as they relate to the involvement of A-9."

17. In this case, statements of P.W.3 to P.W.6 being improvement are not reliable to accept in the light of **Rudrappa Ramappa Jainpur & others vs. State of Karnataka(supra)**. Moreover, the statement of P.W.-2 is not corroborated by any other evidence. Hence testimony of P.W.-2 is not trustworthy to accept on this point. Hence there is a solitary testimony of P.W.2 available against the accused persons.

18. P.W.-4 Smt. Sone Devi stated before the Court that one accused Sukh Ram @ Sukha had raped her. Other witnesses also narrated before the Court the story of rape while this fact is neither mentioned in the FIR nor in their statements under Section 161 Cr.P.C. which shows that due to enmity they have given statements in exaggerated form. Hence, this statement is also not reliable.

19. P.W.2 to P.W.6 deposed under Section 161 Cr.P.C. that all the assailants had covered their face with 'dhata',

hence they could not identify them. They have also stated that all the assailants were outsiders. In these circumstances, how it is possible that P.W.-2 could identify that assailants are the accused persons.

20. P.W.-6 Rajendra has admitted in his cross-examination that only assailants were possessing torch and they did not have the same. There was only light of 'Argan' and the light which was generated due to burn of 'Bitaura'. The statements of P.W.-2 to 5 are exaggerated statements.

21. Statement of P.W.-2 that he has identified the accused, is not fully believable because he is not injured witness. Other injured witnesses have not stated the names of accused in the statements recorded under Section 161 Cr.P.C. According to FIR, Roshan Lal, Het Ram and Nawab Singh are named witnesses and they are not family members of the informant but the prosecution has not examined any of them before the Court. P.W.-5 Bani Singh has stated in his cross-examination that Roshan Lal, Het Ram, Nawab, Chiranji and Pratap were also present at the time of incident but they have also not been examined by the prosecution in the Court. Hence, the statement of P.W.-2 is not corroborated by any independent witness.

22. The incident is of night at 11:30 P.M. of the village, villagers normally start sleeping early and it appears unnatural that informant was not sleeping and identified the assailants. It is not a case of prosecution that by gesture, informant had identified the assailants.

23. In evidence, it has been stated by P.W.-2 to P.W.-6 that jewellery and clothes were looted but nothing was

recovered from any of accused/appellants.

24. The story of light which was generated by burning of 'Bitaura' and torch, was not narrated by the informant as well as all witnesses in their statements under Section 161 Cr.P.C. but for the first time it was stated before the Court which is an improvement.

25. Similarly in the FIR, there is nowhere mention of loot of money and first time it was deposed before the Court. There is contradiction also in the statements of witnesses, somewhere it is stated as Rs.60,000/- and somewhere Rs.80,000/-. It seems that the FIR was lodged on the basis of suspicion.

26. There are injury reports of injured witnesses namely, Sone Devi, Bani Singh, Rajendra Singh and Padam Singh. Sone Devi, Bani Singh and Rajendra Singh who are relatives, have been examined. But Padam Singh who was important and an independent witness, has not been examined in the trial Court by the prosecution.

27. Though D.W.-1 Mohan Singh was prosecution witness but prosecution has not examined him. He was examined by defence as D.W.-1 from the side of accused persons who stated that occurrence took place on same date, time and place but the dacoity was not committed by these five named accused/appellants but it was done by some unknown assailants. Hence statement of D.W.-1 is more reliable than the prosecution witnesses P.W.2 to P.W.6. Prosecution witnesses P.W.2 to P.W.6 are highly interested and partisaned witnesses hence not believable.

28. In the case of **Lallu Manjhi & Another vs. State of Jharkhand** reported in **AIR 2003 SC 854**, the Supreme Court has held as below:-

“The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories, namely (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon testimony of a single witness. {See - *Vadivelu Thevan etc. v. State of Madras*, AIR 1957 SC 614}.”

29. After analysing judgment of Supreme Court in **Lallu Manjhi & Another vs. State of Jharkhand(supra)** we find that the testimony of P.W.3 to P.W.6 are “wholly unreliable” and testimony of P.W.2 come in the category of ‘neither wholly reliable nor wholly unreliable’ being not corroborated by any other evidence. The testimony of P.W.2 is not reliable which may inspire confidence. Considering improbabilities and infirmities in the statements of P.W.2, the accused cannot be convicted because they are interested, inimical and partisaned witnesses.

30. Considering the testimony of prosecution witnesses and the defence witness, we find that prosecution has failed to prove the charges levelled against the appellants beyond reasonable doubt and appellants are liable to be acquitted.

31. For the foregoing discussions, the aforesaid Criminal Appeal Nos. 7946 of 2008 and 7988 of 2008 are allowed and impugned judgment and order dated 15.11.2008 passed by the trial Court convicting and sentencing appellants Nahar Singh, Nihal Singh, Pappu @ Ram Prakash, Sukh Ram and Netra Pal under Section 396 IPC is hereby set aside. The accused appellants are acquitted. Appellant No.2 Sukh Ram in Criminal Appeal No. 7988 of 2008 is on bail. He need not surrender. His bail bonds are cancelled and sureties are discharged from their liabilities. Other appellants namely, Nahar Singh, Nihal Singh, Pappu @ Ram Prakash and Netra Pal are languishing in jail. They shall be released forthwith if not required to be detained in any other case. All five appellants are directed to file personal bond and two sureties each in the like amount to the satisfaction of the Court concerned in compliance of Section 437-A of Cr.P.C.

32. Copy of this judgment alongwith original record of Court below be transmitted to the Court concerned for necessary compliance. A compliance report be sent to this Court within one month. Office is directed to keep the compliance report on record.

(Aniruddha Singh, J.) (Ramesh Sinha, J.)

Order date: 5.12.2017/P.P.