HIGH COURT OF JUDICATURE AT ALLAHABAD

CRIMINAL APPEAL No. - 1173 of 1985

Ram Bishal And Another

.....Appellant(s)

Versus

State of U.P.

.....Respondent(s)

Counsel for Appellant(s)	:	Ashutosh Upadhyay, K.N.Saxena
Counsel for Respondent(s)	:	A.G.A.

Court No. - 90

HON'BLE MRS. VANI RANJAN AGRAWAL, J.

1. Heard Sri Ashutosh Upadhyay, learned counsel for the appellant and Sri Ashish Kumar Srivastava, learned A.G.A. for the State respondent.

2. The present appeal has been preferred against the judgment and order dated 26.04.1985 passed by learned Special Judge (D.A.A), Banda in Sessions Trial No.513 of 1985 arising out of Crime Nos.84/87 of 1981 (State vs. Ram Vishal and Ors.) P.S. Kotwali, District Banda, whereby the accused appellants have been convicted and sentenced for the offence punishable under Sections 399 and 402 I.P.C and Section 27 of the Arms Act.

3. During the pendency of the present appeal, appellant no.2 Ram Narayan had died. Consequently, this appeal in so far as it relates to appellant no.2 - Ram Narayan stands abated.

4. The present appeal, therefore, survives for consideration only in respect of the surviving appellant No.1- Ram Vishal.

5. The prosecution case in brief is that during the intervening night of 13/14.02.85, Sub Inspector R.S. Saraswat received an information through an informer that a gang of dacoits was likely to assemble behind the temple of Hanuman Ji, situated in village Tindwara with an intention of committing robbery and dacoity in the buses going and passing through the road. The information was entered in the General Diary, and thereafter, a police party was constituted in three separate teams which took them to place. According to the prosecution some persons assembled near the temple, one of them allegedly stated that Lallan had not yet arrived, whereupon another person remarked that there was no justification to wait for him as they already have sufficient fire arms and manpower to commit robbery in buses. It is further alleged that the persons present started sloganeering 'Jai Bajrang' and

proceeded. Subsequently, they were challenged by the police party and Raj Bahadur, Daya Shankar, Ram Vishal, Ram Narayan and Pooran were arrested.

6. Upon search, one country made pistol along with three cartridges was recovered from the possession of the present appellant Ram Vishal, whereas lathi was recovered from the possession of Ram Narayan. On the basis of the said recovery it was purported that they were making preparation to commit dacoity and assembling to commit the offence punishable under Section 27 Arms Act.

7. On the basis of the recovery memo, the first information report was registered and the corresponding General Diary entries were made. After completion of the investigation, a charge-sheet was submitted. The learned trial Court summoned the accused persons and framed charges under the aforesaid provisions. The accused persons denied the charges and claimed to be tried.

8. In order to substantiate it's case, the prosecution examined P.W.-1 Sub Inspector Sri Mitan Ram and P.W.-2 Sub Inspector Sri Nanku Singh.

9. P.W.-1 Sub Inspector Sri Mitan Ram supported the prosecution version and proved the alleged recoveries of the recovered articles- the country made pistol and cartridges Exts.1-4 from the possession of Ram Vishal while the lathi and torch has been shown to be recovered from Ram Narayan as Ext. 5 and 6. He also proved the recovery memo Ext.ka-1 Carbon copy of general diary regarding the information received through informer, Ext.ka-2, the F.I.R. Ext.ka-3 and the corresponding general diary entry Ext.ka-4.

10. P.W.-2 Sub Inspector Sri Nanku Singh was an eye witness, who also supported the prosecution version including the recovery. No other witness was examined by the prosecution.

11. In their statement recorded under Section 313 Cr.P.C. the accused denied the incriminating circumstance and asserted that they have been falsely implicated. However, no evidence was adduced in defence.

12. Upon appreciation of the evidence available on record, the learned trial Court convicted and sentenced the accused persons for the offences mentioned above; hence the present appeal.

13. This Court has heard learned counsel for the surviving appellant as well as learned A.G.A for the State and has carefully examined the material available on record.

14. The principle question which arises for consideration is whether the prosecution has succeeded in establishing it's case beyond reasonable doubt that the surviving appellant namely Ram Vishal was either making preparation of committing dacoity within the meaning of Section 399 I.P.C. or with requisite intention for assembling to commit dacoity thereby attracting Section 402 IPC.

15. Before proceeding further, it would be appropriate to note that section 399, 402 IPC contemplate two difference offences. Section 399 I.P.C. penalizes the act of making preparation for committing dacoity, whereas, Section 402 I.P.C. penalizes the act of assembling for the purpose of committing dacoity. Mere presence of a person at a place with another person, even along with possession of articles capable of being used as a weapon, establishes either of these offences.

16. For attracting Section 399 I.P.C., the prosecution is required to establish some definite act or conduct demonstrating that the accused has proceeded beyond the stage and had undertaken preparation for committing dacoity. Similarly, as per Section 402 I.P.C., the prosecution must establish that the assembly was for committing dacoity. The essential element of the requisite intention cannot be presumed merely from the presence of the several persons at a particular place.

17. In the present case, the prosecution primarily relied upon the alleged conversation among the accused persons, which, according to the police, indicated their intention to commit robbery in buses. However, apart from the testimonies of the two police officials, there is no independent witness to corroborate either the alleged conversation or the existence of any definite plan to commit dacoity.

18. It is noteworthy that no bus, prospective victim or any other material suggesting that the accused person had actually undertaken any steps for committing dacoity has been brought on record. No specific arrangement, division of roles, identification of a target or any other circumstance demonstrating an organized plan to commit dacoity, has been established.

19. The alleged possession of a country-made pistol and cartridges by the surviving appellant, even if accepted for the sake of argument, cannot by itself establish that he was making preparations for committing dacoity or had assembled with the specific object of committing dacoity. The prosecution was required to establish the nexus between the possession of the weapon and the intended commission of dacoity. Such nexus is conspicuously missing in the present case.

20. Another significant circumstance is that the alleged fire arm and cartridge were never sent to Forensic Science Laboratory for examination. Consequently, there is no scientific evidence on record regarding the nature, condition or working order of the alleged fire arm. Though the absence of Forensic Science Laboratory examination report may not, by itself, be fatal in every case, in the facts of the present case, it assumes significance particularly when the alleged recovery constitutes an important circumstance relied upon by the prosecution.

21. It is also relevant to note that no criminal antecedents of the surviving appellant have been brought on record. No material has been produced to establish that he was associated with any known gang of dacoits or had previously been involved in similar criminal activities. It is true that the absence of criminal antecedents cannot, by itself, furnish a ground for acquittal, just as previous involvement in criminal activities is not an essential ingredient of the offences punishable under Sections 399 and 402 I.P.C.. Nevertheless, in the present case, where the prosecution seeks to establish the alleged object of the assembly primarily on the basis of an alleged conversation and the surrounding circumstances, the absence of any such antecedents assumes some significance while assessing the prosecution's case as a whole.

22. It is further noticeable that the informant, namely, the officer who allegedly received the secret information and set the police machinery into motion, has not been examined. The prosecution has, therefore, failed to afford the defence an opportunity to test the circumstances in which the alleged information was received, the manner in which the police party was constituted, and the steps allegedly taken pursuant thereto. The Investigating Officer has also not been examined. Although the non-examination of the Investigating Officer is not invariably fatal to the prosecution, such omission assumes significance where the prosecution case substantially rests upon the surrounding circumstances, police information and alleged recoveries.

23. The entire prosecution case rests upon the testimony of two prosecution witnesses. The testimony of the prosecution witnesses cannot, by itself, form the basis of conviction, and their evidence is required to be assessed on the same principles as those applicable to any other witnesses. However, in the peculiar facts and circumstances of the present case, the absence of corroborative evidence, coupled with the failure of the prosecution to establish the essential ingredients of the offence, raises serious doubt about the prosecution case.

24. There is yet another deficiency in the prosecution case. The prosecution

has neither examined the Investigating Officer nor placed on record any material demonstrating due compliance with the statutory requirements governing prosecution under the Arms Act. In particular, no sanction of the District Magistrate, as contemplated under Section 39 of the Arms Act, has been placed on record.

25. Insofar as the charge under Section 27 relates to an offence involving contravention of Section 3 of the Arms Act, the statutory requirement of obtaining previous sanction, wherever attracted, cannot be treated as an empty formality. Compliance with such a requirement is a condition precedent to the institution of prosecution for the offence.

26. So far as the offence under Section 27 Arms Act is concerned, there is absolutely no evidence that the surviving appellant has used the fire arms in any manner. The prosecution has not alleged any firing or use of the fire arm; mere alleged possession of the fire arm would not bring the case within the ambit of Section 27 Arms Act.

27. It is also significant that the prosecution has not produced any material to establish that the alleged assembly was part of an organized gang or that the persons apprehended had a definite intention to commit dacoity. Although the existence of a previously organized gang is not an indispensable requirement for attracting Section 399 I.P.C., the prosecution must nevertheless establish, through cogent evidence, that the assembly was formed with the specific intention of committing dacoity. The mere fact that certain persons were allegedly found together at an isolated place during night hours cannot, by itself, be elevated to proof of an assembly for the purpose of committing dacoity.

28. The alleged conversation attributed to the accused, even if accepted in its entirety, does not find corroboration from any independent circumstance. The prosecution has failed to establish that the accused persons had identified any particular bus or target, made any concrete arrangements, or taken any identifiable steps towards the commission of dacoity. In the absence of such supporting circumstances, the alleged conversation, as narrated by the police witnesses, does not inspire sufficient confidence to establish the commission of offences under Sections 399 and 402 I.P.C.

29. Upon an overall consideration of the evidence on record, this Court finds that the prosecution has failed to establish that the surviving appellant had formed, or was a member of, an assembly constituted for the purpose of committing dacoity. The alleged recovery of a pistol and cartridges, even if accepted to have been effected, does not, in the absence of other cogent

evidence, establish the essential ingredients of Sections 399 and 402 I.P.C.

30. The learned trial Court appears to have drawn an inference of guilt primarily from the alleged presence of the accused persons at the spot, the alleged conversation, and the recovery of certain articles. However, such circumstances, taken individually or collectively, could not legally form the basis of conviction in absence of evidence establishing the essential ingredients of the offences charged. The approach adopted by the learned trial Court, therefore, suffers from an erroneous appreciation of the facts and evidence on record.

31. In view of the what has been discussed hereinabove, this court is of the opinion that the prosecution has failed to establish it's case beyond reasonable doubts. The appellant is entitled is for benefit of doubt. Accordingly, the appeal is allowed the impugned order dated 26.4.1985 passed by the learned Special Judge (D.A.A.) Banda, in so far as it relates to the surviving appellant no.1 namely Ram Vishal is hereby set aside. The appellant is acquitted for of the offence under Sections 399 and 402 I.P.C., by extending him the benefit of doubt.

32. The appellant is on bail he need not to surrender, his bail bonds are cancelled and sureties are discharged.

33. Let a copy of this order be forwarded to the learned trial Court for information and necessary compliance.

October 27, 2026
Dev

(Mrs. Vani Ranjan Agrawal,J.)

Digitally signed by :-
DEV PRAKASH
High Court of Judicature at Allahabad