Iqbal & Anr vs State Of U.P on 6 May, 2015

Equivalent citations: 2015 AIR SCW 3035, 2015 (6) SCC 623, AIR 2015 SC(CRI) 1244, 2015 (4) ALJ 239, AIR 2015 SC (SUPP) 1261, (2016) 1 MH LJ (CRI) 44, (2016) 1 MADLW(CRI) 1, (2015) 2 ALLCRIR 2238, (2015) 3 CURCRIR 11, (2015) 2 ORISSA LR 667, 2015 CRILR(SC&MP) 663, (2015) 3 CRIMES 35, (2015) 89 ALLCRIC 944, (2015) 3 KCCR 285, (2015) 6 SCALE 110, (2015) 150 ALLINDCAS 30 (SC), 2015 CRILR(SC MAH GUJ) 663, (2015) 3 ALLCRILR 165, (2015) 2 CRILR(RAJ) 663, 2015 CALCRILR 3 1, 2015 (3) SCC (CRI) 301, (2015) 3 JCR 147 (SC), (2015) 3 JLJR 94, (2015) 61 OCR 437, (2015) 2 UC 1066, (2015) 3 MAD LJ(CRI) 36, (2015) 3 PAT LJR 216, (2015) 2 RECCRIR 941

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Bench: R. Banumathi, T.S. Thakur

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1663 OF 2012

IQBAL AND ANOTHER …APPELLANTS

VERSUS

STATE OF UTTAR PRADESH …RESPONDENT

J U D G M E N T

R. BANUMATHI, J.

This appeal by special leave arises out of the judgment dated 14.05.2012, passed by the High Court of Judicature at Allahabad dismissing Criminal Appeal No.2 of 1981, confirming the conviction of the appellants under Section 396 IPC and also the sentence of ten years rigorous imprisonment imposed on each of them.

2. Case of the prosecution is that on the intervening night i.e. on 21/22.09.1979, the complainant-Patia Singh (PW1) was sleeping in his house. His brothers Saran Singh, Sukhbeer Singh and his children were sleeping in their house. Both the houses were adjacent to each other. In

the midnight at about 1.00 o'clock, PW1-Patia Singh heard the noise of gun firing and in the light of torch, he saw that in the house of his brother Saran Singh, about 14-15 dacoits were looting the property and that two of them on the roofs and two dacoits were standing on the gate holding guns and they were continuously firing. All the inmates of the house witnessed the incident in the torch light and electric light emanating from tube well. On raising alarm, the villagers came out to help them and they were carrying torches and they warned the dacoits from behind the walls. When Saran Singh tried to control the dacoits, the dacoits opened fire and he was shot dead. The miscreants looted the articles in about one and half hours and fled away from the scene.

3. On the basis of the statement of the complainant–Patia Singh (PW1), a case was registered under Section 396 IPC in FIR No.258/1979 in P.S. Parikshitgarh, Meerut on 22.09.1979. PW8-Nepal Singh (SI) had taken up the investigation and he investigated the spot and collected the list of looted articles from Jay Singh and Sukhbeer Singh. Harpal Singh-PW4(SI) conducted the inquest on the body of the deceased Saran Singh. Autopsy on the dead body was performed on 23.09.1979 by Dr. S.P. Goel and he opined that the death was due to gunshot injuries. PW8-Nepal Singh recorded the statement of the witnesses and seized the torches, lanterns and prepared the site map and recovery memo. The accused were arrested on the night of 8/9.10.1979 and the test identification parade was conducted in District Jail, Meerut on 15.11.1979 by PW6-Seeta Ram (Special Executive Magistrate). PW7-Bhanu Pratap (SI) had taken up further investigation and received the report of test identification parade. On the basis of investigation conducted by PW7 and his predecessor investigating officers, chargesheet was filed against the accused-appellants, namely, Iqbal and Khurshed and against non-appealing accused, namely, Kripa s/o Buddhu and Kishnu s/o Ram Chander under Section 396 IPC.

4. To bring home the guilt of the appellants, prosecution examined as many as ten witnesses and exhibited documents and material objects. Upon appreciation of evidence, VIth Additional Sessions Judge, Meerut held that the prosecution proved the case beyond reasonable doubt and vide judgment dated 23.12.1980, convicted the accused-appellants and the non-appealing accused under Section 396 IPC and sentenced them to undergo ten years rigorous imprisonment. Aggrieved by the verdict of conviction, the appellants namely, Iqbal, Kishnu and Khurshed, preferred Criminal Appeal No.2 of 1981 and Kripa filed Criminal Appeal No.5 of 1981 in the High Court of Judicature at Allahabad. After three decades of delay, the High Court vide judgment dated 14.05.2012, dismissed both the criminal appeals and thereby confirmed the conviction and also the sentence of imprisonment imposed on them. Aggrieved by the dismissal of their appeal, the appellants herein, namely, Iqbal and Khurshed, have preferred this appeal assailing the correctness of the verdict of conviction.

5. Learned counsel for the appellants contended that at the time of incident, it was pitch dark and it would have been highly improbable for the witnesses to identify the dacoits with flash of torches. It was further submitted that PW1-Patia Singh had given an exhaustive list of more than fifty valuable items which had been stolen, but except three kilograms of ghee in a clay pot, nothing was recovered from the appellants and in the absence of substantive evidence corroborating the identification, the courts below ought not to have convicted the appellants. It was also submitted that the appellants have no criminal antecedents to commit such heinous crime.

6. Per contra, learned counsel for the respondent– State of Uttar Pradesh contended that the testimony of PW1-Patia Singh, PW2-Jay Singh and PW3-Begraj who are the eye witnesses and their presence on the spot is quite natural and they being the eye witnesses to the incident had seen the dacoits for a considerable time and, therefore, identification of the appellants being the dacoits cannot be doubted. It was further argued that based on the testimony of PW1 to PW3 and other materials on record, courts below by concurrent findings convicted the appellants under Section 396 IPC and such concurrent findings cannot be interfered with.

7. We have carefully considered the rival submissions and perused the impugned judgment and evidence on record.

8. PW1-Patia Singh, who is the complainant, has narrated the incident stating that about 1.00 o'clock in the night of 21/22.09.1979 about 14-15 dacoits came and looted the house of his brother Saran Singh. On hearing alarm, villagers, namely, Ganga Saran, Daya Chand and Devi Singh who were having torches came and took shelter in PW1's house and with the torch light, he was able to see the dacoits. PW1 further stated that after the commission of the dacoity when he entered into his brother's house he saw his brother-Saran Singh being shot dead. He has stated that there is a road of three and a half yards width between his house and his brothers' houses and that other villagers witnessed the incident from the shelter of his house in the sitting room.

9. PW2-Jay Singh, son of the deceased Saran Singh, has stated that on that fateful night he was sleeping in the verandah of his house, which is adjacent to PW1's house, with his father Saran Singh, Haran Singh and other inmates of the house. PW2 further deposed that at about 1.00 o'clock in the night about 14-15 dacoits came with the torches and looted the house and also started firing. In order to save his life, he came out running from the house and took shelter in the sitting room of PW1-Patia Singh (PW1) and PW2-Jay Singh further stated that from the house of PW1, he saw the faces of dacoits in the flash light of torches. He further stated that after the incident, he went back to his house and found that his father Saran Singh being shot dead. PW3-Begraj also deposed on the same lines that on the critical night of the incident, he heard sound of fire arms and he went to Albel's house which is at a distance of five-six yards from the house of the deceased. He further stated that he saw the faces of the dacoits in the torch light flashed by the villagers.

10. In cases of dacoity, usually, the offence is committed by unknown persons with the criminal background. It is only in very few cases, the accused-dacoits are known to the victim. PW1-Patia Singh and PW2-Jay Singh have stated that they had witnessed the incident from a distance of three and half yards. PW3-Begraj also stated that he had witnessed the incident from a distance of five-six yards in the feeble torch light. Admittedly, according to the witnesses, there was no electricity at the time of incident in their houses. They claimed that they could see the accused persons with the help of their torch lights. In the courts below, onbehalf of the accused persons, it was argued that the night of incident was an amavasya-new moon night. A perusal of calendar of that month in that year, it is seen that the intervening night of 21/22.09.1979 was a new moon night i.e. 'amavasya'.

11. In our considered view, it is unbelievable that on a new moon night when it was pitch dark, the witnesses who were frightened and who were hiding themselves behind the walls in order to save

themselves, could have seen actual faces of the accused persons just by flash of torch lights on their faces and in the light of lantern. Further, there were about 14-15 dacoits in number, all armed with deadly weapons and were continuously making ingress and egress in the house of the deceased, it becomes inconceivable as to how the witnesses standing at a distance in a feeble light would have been able to identify the dacoits.

12. When the witnesses in a panicky state and standing at a distance of three and half yards and five-six yards, it is doubtful whether the witnesses would have gained enduring impression of the identity of the accused. In the commission of offence of dacoity, identification becomes susceptible to errors and miscarriage of justice. In Hari Nath and Anr. vs. State of U.P., (1988) 1 SCC 14, this Court held as under:-

> "16....The conduct of an identification parade belongs to the realm, and is part of the investigation. [pic]The evidence of test identification is admissible under Section 9 of the Evidence Act. But the value of the test identification, apart altogether from the other safeguards appropriate to a fair test of identification, depends on the promptitude in point of time with which the suspected persons are put up for test identification. If there is unexplained and unreasonable delay in putting up the accused persons for a test identification, the delay by itself, detracts from the credibility of the test.
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> 17. The one area of criminal evidence susceptible of miscarriage of criminal justice is the error in the identification of the criminal. Indeed Prof. Borchard's Convicting the Innocent records several criminal convictions in which the accused was subsequently proved innocent. The major source of the error is to be found in the identification of the accused by the victim of the crime. Indeed the learned author refers to the source of mistaken identification thus:
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> "The emotional balance of the victim or eyewitness is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy. Into the identification enter other motives not necessarily stimulated originally by the accused personally — the desire to requite a crime, to exact vengeance upon the person believed guilty, to find a scapegoat, to support, consciously or unconsciously, an identification already made by another. Thus, doubts are resolved against the accused."
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> 18. Glanville Williams in The Proof of Guilt — (Hamlyn Lectures) — refers to the errors of recognition breeding an invincible assurance in the witnesses, highly deceptive for those who are not forewarned of such possibilities, and excerpts Gorphe's results of a continental investigation, thus:
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> "There is no difference from the subjective point of view, between true and false recognition, so far as their intrinsic qualities are concerned, and there are no objective signs to distinguish one from the other. .... The witness's certainty may not

> be immediate, without this delay being necessarily a sign of error. Nevertheless, error is more frequent when recognition comes some time after seeing....
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> The act of recognition is very open to suggestion in all its forms.... Resemblance is a matter of relativity. For a white person, all negroes are like each other, and conversely. A person can [pic]much better distinguish those of his own age and condition than those of different ages and condition. Uniform is a cause of fallacious resemblance, above all for those who do not wear it. (emphasis supplied)"
>
> 19. The evidence of identification merely corroborates and strengthens the oral testimony in court which alone is the primary and substantive evidence as to identify..."

13. As noticed earlier, test identification parade was conducted in jail on 15.11.1979 by PW6-Special Executive Magistrate in which the witnesses PW1, PW2 and PW3 identified the accused. As far as test identification parade is concerned, it is relevant to note that accused-Kripa has contended that he had been falsely implicated in the case because of the rivalry with Rampal Singh and his maternal uncle Mangeram. Accused-Kripa also pleaded that the witnesses knew them as they were living in nearby villages and because of rivalry, they were being falsely implicated in the case. So far as appellant No.2–Khurshed and another co-accused-Kishnu are concerned, they had stated that they were arrested by the police from their houses and they were shown to the witnesses at the police station and they were also photographed before holding test identification parade.

14. Even though the complainant-PW1 and other witnesses have denied the defence plea, in the light of the fact that the incident occurred in the pitch of darkness, the identification of the appellants by the witnesses has to be viewed with caution and the court is to look for corroboration strengthening the identification.

15. Evidence of identification of the miscreants in the test identification parade is not a substantive evidence. Conviction cannot be based solely on the identity of the dacoits by the witnesses in the test identification parade. The prosecution has to adduce substantive evidence by establishing incriminating evidence connecting the accused with the crime, like recovery of articles which are the subject matter of dacoity and the alleged weapons used in the commission of the offence.

16. It is pertinent to note that in the present case no recovery of articles which are the subject of dacoity was made from the appellants or other non-appealing accused persons. In his complaint, PW1 gave a list enumerating fifty expensive items, such as gold jewellery, silver articles, sarees and clothes and also cash. As per the recovery memo, what was recovered was just three kilograms of ghee in a clay pot. In his deposition, PW8-Nepal Singh (investigating officer) has stated that at the instance of Kripa, he had recovered a 'chaptaghu' and an 'attire'. However, in the recovery memo, only three kilogram of ghee is mentioned which is said to have been recovered on the disclosure statement of accused Kripa. From the appellants as well as from the non -appealing accused persons, not a single item of valuable out of the whole list of stolen articles was recovered. It is quite unbelievable that within a short span of time i.e. from 21.09.1979 (date of incident) to 9.10.1979

(date of arrest), the accused would have converted or sold out all the valuable items. Even if we accept that they had done so, the prosecution ought to have adduced evidence as to how and in what manner the articles which were the subject matter of dacoity were either disposed of or converted. Murder and robbery were part of the same transaction. Consequent upon the disclosure statement, only three kilograms of ghee was recovered.

17. In order to bring home the guilt of the accused persons, it is the duty of the prosecution to prove that the stolen property was in the possession of the accused persons or that the accused had knowledge that the property was a stolen property or the accused persons had converted the stolen property. No such recovery was made to connect the appellants and other non-appealing accused persons with the crime.

18. In the trial court, on behalf of some of the accused persons, a plea was taken that some of the accused were known to the witnesses and that the accused are resident of Jayee village and Buksar village and are doing cultivation and that the accused are known to the witnesses. The prosecution witnesses having known to the accused earlier, the witnesses are residents of village Etmadpur and used to take the bus at village Jayee and at village Khajoori bus stand. The courts below observed that the identification of the appellants cannot be discarded merely on the ground that the appellants and accused Kishnu reside in the village Buksar and that the witnesses knew the accused long before. The accused could not adduce evidence to substantiate the defence plea that the prosecution witnesses had known the accused earlier. Non-adducing of evidence to substantiate the defence plea by the accused seems to have substantially weighed in the mind of the trial court to accept the prosecution case.

19. Courts below based the verdict of conviction solely on the oral testimony of PW1 to PW3 and the identification of the appellants and other non-appealing accused in the test identification parade. As discussed earlier, in the absence of any other evidence like recovery of stolen jewellery or other articles strengthening the prosecution case, conviction cannot be based solely on the identification of the accused in the test identification parade. Serious doubts arise as regards identification of the accused regarding complicity of the appellants in the commission of dacoity and their identification by the witnesses and the prosecution has failed to prove the guilt of the accused beyond reasonable doubt and in our view, the conviction of the appellants under Section 396 IPC cannot be sustained and is liable to be set aside.

20. Conviction of the appellants under Section 396 IPC and the sentence imposed on them is set aside and this appeal is allowed. The appellants are ordered to be set at liberty forthwith unless they are required in any other case.

.....J. (T.S. THAKUR) .....J. (R. BANUMATHI) New Delhi;

May 6, 2015
