

Present:
 Ms. Justice Naima Haider
 and
 Mr. Justice Md. Ruhul Quddus

Criminal Appeal No.2451 of 1995

Teli alias Mantu and others
 ... Appellants

-Versus-

The State
 ... Respondent

Ms. Afsana Begum, Advocate
 ... for the appellants

Ms. Promila Biswas, D.A.G.
 ...for the respondent

Judgment on 20.4.2011

Md. Ruhul Quddus, J:

This appeal under section 410 of the Code of Criminal Procedure is directed against judgment and order dated 30.10.1995 passed by the Additional Sessions Judge, Naogaon in Session Case No.40 of 1994 convicting the appellants under sections 395 and 397 of the Penal Code and sentencing appellant Nos.1 and 3 thereunder to suffer rigorous imprisonment for nine years with a fine of Taka twenty thousand for each in default to suffer rigorous imprisonment for six months more, while sentencing appellant Nos.2, 4 and 5 to suffer rigorous imprisonment for seven years.

Facts relevant for disposal of the appeal, in brief, are that one Ataur Rahman (P.W.1) made an oral *ejahar* with Naogaon police station on 20.1.1994 alleging *inter alia*, that at the previous night he and the members of his family were sleeping. At about 3.15 a.m. his father (P.W.7 Jarip

Uddin) cried out as some dacoits had broken the main gate of their house, entered into his (Jarip Uddin's) room and started beating him. His (informant's) brother Abul Kalam Azad (P.W.2) came out from his room, when three/four dacoits attacked him and two of them entered into his (Abul Kalam Azad's) room and asked his wife to give the valuables pointing a knife on her neck. The informant raised alarm, when their neighbors started approaching towards the house. In the light of torch used by the dacoits, his brother victim Abul Kalam Azad could recognize appellant Nos.1-2 and asked them as to why they were doing so. In that event appellant No.1 dealt him with a Chinese axe causing bloodily injury on his right jaw. He tried to resist the dacoits taking a *shabol* in his hand and could recognize one of them named Mokles. Their neighbor Yakub Ali Member made a blank fire with his gun, hearing which the dacoits fled away taking a tape recorder and bi-cycle, but subsequently left the bi-cycle at the courtyard of their house. They (dacoits) were wearing *lungi* and wrapper and were 22-35 years old. After commission of the occurrence, some of their neighbours namely, Yakub Ali (P.W.9), Abu Taleb (P.W.8), Makbul Hossain (not examined) Sayer Uddin (not examined) and Azizur Rahman (not examined) rushed to their house, to whom the informant disclosed the names of the said three dacoits.

The *ejahar* gave rise to Naogaon Police Station Case No.13 dated 20.1.1994. The police, after investigation submitted charge sheet on 24.6.1994 against the appellants under sections 395 and 397 of the Penal Code. The case after being ready for trial, was sent to the Court of Sessions Judge, wherein it was registered as Session Case No.40 of 1994.

The learned Sessions Judge by his order dated 10.11.1994 framed charge against the appellants under the said penal sections, to which they pleaded not guilty and claimed to be tried. Thereafter the case was transferred to the second Court of Assistant Sessions Judge, Naogaon and subsequently retransferred to the first Court of Assistant Sessions Judge for hearing and disposal.

In support of its case, the prosecution examined ten witnesses, of whom P.W.1 Md. Aatur Rahman was the informant; P.W.2 Abul Kalam Azad was his brother; P.W.3 Javed ali was his another brother; P.W.4 Mahfuja Begum was wife of P.W.2; P.W.5 Mst. Monwara Begum was wife of P.W.3; P.Ws.6-7 Jobeda Khatun and Jarip Uddin were his parents; P.W.8 Abu Taleb was his cousin brother; P.W.9 Md. Yakub Ali Dewan was his neighbor and a former Member of local Union Parishad, and P.W.10 Md. Ferdous Ali was the Officer-in-charge of Naogaon Police Station. After closing the prosecution, learned Assistant Sessions Judge examined the appellants under section 342 of the Code of Criminal Procedure, to which they reiterated their innocence, but did not examine any witness in defense. The defense case as it transpires from the trend of cross-examination is that the appellants were innocent and falsely implicated in the case out of election feud.

After conclusion of trial, learned Judge found the appellants guilty of offence under sections 395 and 397 of the Penal Code and accordingly pronounced his judgment on 30.10.1995 convicting and sentencing them as aforesaid. The appellants moved in this Court with the instant criminal

appeal challenging the said judgment and order of conviction and sentence, and subsequently obtained bail.

Ms. Afsana Begum, learned Advocate appeared for the appellants with leave of the Court and submitted that the offence of dacoity have not been proved against the appellants beyond reasonable doubt, but the learned Assistant Sessions Judge on wrong assessment of evidence convicted and sentenced them by the impugned judgment and order, which is liable to be set aside.

On the other hand, Ms. Promila Biswas, learned Deputy Attorney General submitted that the learned Assistant Sessions Judge on proper assessment of evidence clearly found the appellants guilty of offence under sections 395 and 397 of the Penal Code and rightly sentenced them. There is nothing to interfere with the impugned judgment.

We have carefully examined the evidence and other materials on records. P.W.1, informant Ataur Rahman in his deposition supported the prosecution case, but with departure from his *ejahar*. He stated that the occurrence took place at about 3.15 a.m. The dacoits entered into their house breaking the main gate and injured his father Jarip Uddin and brother Abul Kalam Azad, who could recognize appellant Nos.1-3. His brother Abul Kalam Azad being surprised asked them as to how they could commit dacoity at his house despite they were known to him. In that event appellant No.1 Teli dealt him (Abul Kalam Azad) with a Chinese axe causing grievous bloodily injury on his jaw. He (P.W.1) came out from his room and saw three/four dacoits. He could recognize Intaz Ali and Hamu (herein appellant Nos.4 and 5) amongst them. When the dacoits were

fleeing away, his father Jarip Uddin recognized appellant No.2 Sabu and his mother recognized appellant No.3 Chana. The dacoits took away a tape recorder and bi-cycle, but subsequently left the bi-cycle at the courtyard of their house. He further stated that he mistakenly mentioned the name of Mokles in the *ejahar*. He identified the appellants standing on dock and stated that the members of his family recognized them at the time of occurrence. In cross-examination he stated that he was a student of Intermediate second year. At the time of making the oral *ejahar* at police station, he was accompanied by his cousin brother Abu Taleb, a process server of Naogaon Court. He (P.W.1) admitted that appellant Chana's elder brother Mantu was elected in the previous election defeating Yakub Member, and further admitted that appellant No.2 Sabu was arrested before 2½ /3 p.m. on the date of occurrence and appellant No.1 Teli was arrested on the following day from a place half a mile away from his house.

P.W.2 Abul Kalam Azad stated that he was an employee of the Judges Court, Naogaon. At the fateful night, just after opening the door of his room, he saw appellant Nos.1-3. Appellant No.1 Teli dealt him with a Chinese axe on his jaw. At the time of their retreat, he recognized all the appellants namely, Teli, Sabu, Intaz, Hamu and Chana and disclosed their names to his wife, brother and sister-in-law (wife of brother) just after they had fled.

P.W.7 Jarip Uddin stated that at the night of occurrence at about 3 a.m he cried out as he heard some sound towards the main gate. The dacoits entered into the house and dealt him with a knife on his forehead.

In the light of torch used by the dacoits, he identified one of them as Chana (herein appellant No.3).

The other prosecution witnesses namely, P.Ws.3-6 and 8, who supported the prosecution case in a mechanical manner, are members of same family. P.W.9 Yakub Ali admittedly had election feud with some of the appellants. He deposed that hearing alarm from the house of occurrence, he made a blank fire with his gun and the dacoits fled away. He along with others rushed to the house and saw the victim Abul Kalam Azad lying. His mother (P.W.6 Jobeda Khatun) told that she could recognize appellant Nos.1-2. In cross-examination he denied the suggestion that because of the appellants' campaign against him in the previous election, he took position against them.

P.W.10 Md. Ferdous Ali, the then Officer-in-charge of Naogaon Police Station and one of the Investigating Officers stated that he himself recorded the first information report and took up the case for investigation. He had visited the place of occurrence, prepared the sketch map with index and recorded statements of the witnesses under section 161 of the Code of Criminal Procedure. At the concluding stage of investigation, he was transferred from Naogaon and handed over the record to his successor Officer-in-charge Md. Ruhul Islam, who submitted the charge sheet. In cross-examination he stated that some of the vital prosecution witnesses did not tell him whether they could recognize any of the dacoits or that they (dacoits) took away the tape recorder and bi-cycle.

It appears that P.W.1, informant Ataur Rahman stated in his evidence that he could recognize appellant Nos.4 and 5 while his brother Abul Kalam Azad recognized appellant Nos.1-3, his father Jarip Uddin recognized appellant No.2 and his mother recognized appellant No.3, but in *ejahar* he mentioned only the names of appellant Nos.1-2 to have been recognized by his brother Abul Kalam Azad (P.W.2), whose evidence was not consistent with that of P.W.1 regarding identification of the dacoits. He (P.W.2) stated that at the time of occurrence he recognized all the dacoits and told it to his brother (meaning the informant). If he so recognized and told it to his brother, all of their (dacoits') names could have been mentioned in the *ejahar*, not only two. In their cross-examinations P.Ws.3-6 and 8 made contradictory statements in respect of identification of the dacoits, though all of them were cautious to establish identity of the dacoits. P.W.6 stated in her cross-examination that she could recognize appellant No.2 and P.W.7 stated that he recognized appellant No.3, which is also contradictory with P.W.1. In cross-examination one of the Investigating Officers namely P.W.10 stated that some of the vital prosecution witnesses did not tell him whether they could recognize any of the dacoit. The beginning of the examinations-in-chief of all prosecution witnesses were so mechanical that any person of ordinary prudence would understand that they were tutored witnesses, thus their evidence regarding identification of the dacoits should not be fully relied upon.

P.Ws.2-5 and 8-9 were silent about infliction of any injury upon P.W.7. On the other hand, P.W.7 was silent about infliction of any injury upon P.W.2. The grievous nature of injury allegedly inflicted upon P.Ws.2 and 7 by the dacoits as mentioned in the *ejahar* and also stated in evidence of some prosecution witnesses was not proved by producing any medical

certificate and examining the doctor, which was necessary to prove an offence under section 397 of the Penal Code.

The appellants' previous records appear to be clean in the charge sheet. No independent local witness, except Yakub Ali Dewan who had election feud with some of the appellants, was examined. There is no confessional statement or recovery of the tape recorder that was allegedly taken away by the dacoits. It further appears that appellant No.2 was arrested from his house on the very day of occurrence and appellant No.1 from his area on the following day. It is very unusual that after commission of dacoity in a known house and despite being identified by the inmates, these appellants would still remain at their house/area. It is also not believable that the appellants would commit dacoity in a known house at their own area without masks and colour and would take risk of identification.

Under the above facts and circumstances we are of the view that the allegations of dacoity under sections 395 and 397 of the Penal Code against the appellants have not been proved beyond reasonable doubt and they are entitled to be acquitted on benefit of doubt.

In the result, the appeal is allowed. The judgment and order dated 30.10.1995 passed by the Assistant Sessions Judge, Naogaon in Session Case No.40 of 1994 is hereby set aside. The appellants are acquitted of charges leveled against them. They are also released from their bail bonds.

Send down the lower Court records.

Naima Haider, J:

I agree.