

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.1049 of 2007

Arising Out of Fullidumar Amarpur PS.Case No.296 Year-1990 District- BANKA, giving rise to Sessions Trial No. 463 of 1993, Trial No. 82 of 2007.

Bhago Mian @ Bhagwa Mian, son of Surtali Mian, resident of Village Balsara, P.S. Katoriya, District Banka

.... Appellant

Versus

The State of Bihar

.... Respondent

Appearance :

For the Appellant : Shri Rajesdh Kumar, Advocate (Amicus Curiae).

For the Respondent : Shri S.B.Verma, A.P.P.

CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE ADITYA KUMAR TRIVEDI

Date: 11-03-2015

Appellant Bhago Mian alias Bhagwa Mian, being convicted for an offence punishable under Section 395 of the Indian Penal Code, vide judgment dated 2.5.2007 and sentenced to undergo rigorous imprisonment for life as well as slapped with fine amounting to Rs. 5,000/-, in default to undergo simple imprisonment for two months, vide order dated 3.5.2007 by the learned Presiding Officer, Fast Track Court-V, Banka in Sessions Trial No.463 of 1993/Tr. No.82 of 2007, has preferred the instant appeal.

2. Kuldeep Barnwal (P.W.1) filed a written report on 13.12.1990 alleging inter alia that in the preceding night the unknown thieves committed theft in his house wherein they had stolen away the items so detailed therein. It had also been incorporated that he came to know that the theft was also committed in the house of Rameshwar Mandal of Village Kusifor.

3. After having registration of the case under Sections 457 and 380 of the Indian Penal Code bearing Fullidumar Amarpur P. S. Case No. 296 of 1990, investigation commenced and concluded by way of submission of the charge sheet against the appellant under Sections 395/412 of the Indian Penal Code and being so, the case was committed followed with the trial, which ultimately concluded in the manner, as indicated above, the subject matter of the instant appeal.

4. The defence, as is evident from mode of cross-examination as well as as per the statement recorded under Section 313 Cr.P.C. is of complete denial of occurrence as well as that of false implication.

5. In order to substantiate the case, the prosecution has examined ten P.Ws. side by side has also exhibited certain documents. As is evident, the name of the appellant does not find place in the written report and on account thereof, as is evident from the subsequent event, after his arrest he was put on Test Identification Parade, was identified during the course thereof and that happened to



be the reason behind having put him on trial. With regard to the status of the witnesses, it is evident that P.W.4, P.W.5, P.W. 6, P.W. 7, P.W. 8 and P.W. 9 have not claimed to have identified the appellant though supported the occurrence. P.W.10 is a formal witness and on account thereof also appears to be worthless. Neither the Investigating Officer nor the Magistrate who conducted the Test Identification Parade have been examined.

6. Now, coming to the evidence of the remaining witnesses, P.W.1 Kuldeep Barnwal is the informant, It is apparent that though on an earlier occasion, as disclosed above, he had not named the appellant in the written report, however, during course of evidence, he had claimed to have identified the appellant on the day of occurrence itself and further, disclosed that he was engaged in assaulting him. It is further evident from paragraph 8 of his examination-in-chief that he had claimed identification of the appellant during the course of Test Identification Parade. During the course of his cross examination, at paragraph 20 he has further claimed that he had identified the appellant Bhago Mian alias Bhagwa Mian at the place of occurrence itself. He had also disclosed the aforesaid fact at the Police Station. In paragraph 22 he has further stated that he was not identifying Bhago Mian since before the occurrence. However, the aforesaid assertion of P.W. 1 is found completely ruined by his subsequent statement made in paragraph 22

wherein he had deposed that he had seen Bhago Mian about six months ago during Bolbam and on that very basis, he had claimed and named Bhago Mian. In paragraph 24, he has stated that Bhago had not concealed his face. In paragraph 25 he has stated that after the occurrence he had seen Bhago Mian in the court.

7. P.W.2 Rameshwar Mandal is another witness in whose house dacoity was also committed. In paragraph 2 he has stated that he had identified Bhago Mian and Hattu Mian. In paragraph 4 he has claimed that he had not identified anybody during the course of Test Identification Parade. During the course of cross-examination at paragraph 8 he has stated that he was not knowing Bhago Mian and Hattu Mian since before the occurrence. In paragraph 9 he has stated that the police had apprehended the accused and thereafter he was called upon along with P.W. 1 Kuldeep Barnwal where the Police Officer was present and at that very moment, Hattu and Bhago were present duly handcuffed. He has further stated that he had seen those persons and came to know about their names.

8. P.W. 3 is Jai Prakash Barnwal, the brother of P.W.1, who has also stated in paragraph 4 of his examination-in-chief that he had identified only one Bhago during the course of Test Identification Parade. During the course of cross-examination at paragraph 12, he has stated that the accused persons were apprehended by the police and were brought to Police Station. He had not gone to the Police

Station though he was called upon. In paragraph 13, he has further stated that he was not identifying the accused since before the occurrence.

9. Thus, from the evidence referred to above, it is evident that though the witnesses had supported the case of the prosecution with regard to commission of dacoity or theft, whichever may be, however, the manner of identification as they claimed against the appellant becomes doubtful, more particularly in the background of the fact that at one occasion the informant P.W.1 had claimed to have identified the appellant during the course of occurrence, even then having absence of name of the appellant in the written report submitted by P.W. 1 coupled with the disclosure made by P.W. 2 that after apprehension of the appellant along with Hattu Mian, they were called upon at the Police Station and had occasion to see the appellant much before the Test Identification Parade.

10. So, after considering the evidence of prosecution witnesses, it is manifest that before conduction of T.I Parade, they have an opportunity to see the appellant in presene of police officials. That being so, the T. I .Parade lost its sanctity. Further more, if the evidence of P.W.1 is accepted, then in that event it is apparent that he was well know to appellant by name, then having absence of name of appellant in the written report is another circumstance which suggests otherwise than normal circumstance in getting the appellant identified

as one of the culprits. Consequent thereupon, identification of appellant as one of the culprits does not appear to be out of board. Moreover, it is also apparent from the record that neither the Investigating Officer nor the Magistrate who had conducted the Test Identification Parade have been examined and on account thereof serious prejudice is found to have caused to the appellant as having been debarred to cross examine them on above score. it is apparent that presence of the appellant was found at the Police Station.

11.. Being so, we do not find any just and legal ground to concur with the findings arrived at by the learned trial court and as such the same are set aside.

12. The appeal is allowed.

13. The appellant is under custody, hence he is directed to be released forthwith, if not wanted in any other case.

(Dharnidhar Jha, J)

(Aditya Kumar Trivedi, J)

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