

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No. 78 of 2014

Against the judgment of conviction dated 09.12.2013 and order of sentence dated 16.12.2013 passed by Sri Prabhu Nath Singh, learned 1st Additional Sessions Judge, Sitamarhi in Sessions Trial No. 401/11/19 of 2011 arising out of Nanpur P.S. Case No. 04 of 2011, G.R. No. 15 of 2011

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Laxshmi Das @ Laxmi Kumar Das, S/O Mohan Das, R/O Village - Koyali, P.S. - Nanpur, District - Sitamarhi

.... Appellant

Versus

The State of Bihar

.... Respondent

With

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Criminal Appeal (SJ) No. 82 of 2014

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Indrajeet Rai @ Indrajeet Kumar Yadava, S/O Pragash Rai, R/O Village - Koyali, P.S. - Nanpur, District - Sitamarhi

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

(In CR. APP (SJ) No. 78 of 2014)

For the Appellant : Mr. Dinesh Jha, Advocate

For the Respondent : Mr. Sujeet Kumar Singh, A.P.P.

(In CR. APP (SJ) No. 82 of 2014)

For the Appellant : Mr. Dinesh Jha, Advocate

For the Respondent : Mr. Z. Hoda, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

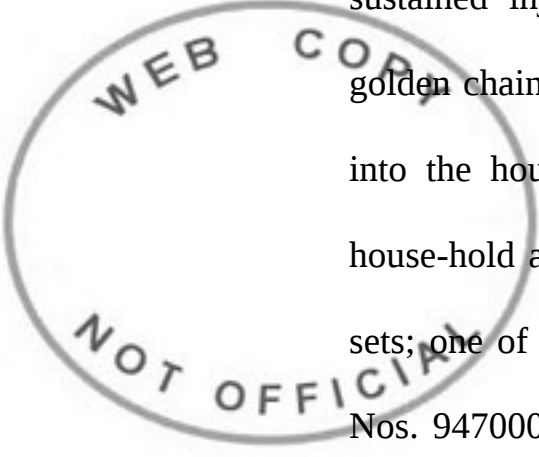
Date: 15-12-2015

Heard learned counsel for the appellants and the State.

2. The appellants have been convicted under Section 307 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years with a fine of Rs.10,000/- each and in default of payment of fine to undergo rigorous imprisonment for one year. The appellants have further been convicted under Section 394 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years with fine of

Rs.10,000/- each and in default of payment of fine to undergo rigorous imprisonment for one year. However, it has been ordered that both the sentences will run concurrently.

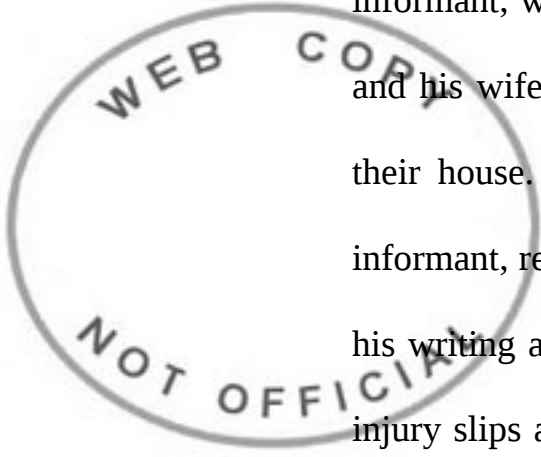
3. The prosecution case, as alleged in the First Information Report by the informant Jagdish Sharma (P.W.1), is that he was sleeping in a room after taking dinner in the night of 7th January and his wife Shail Kumari Devi was also sleeping in the adjoining room. At about 2:00 to 2:30 A.M. he heard the sound of knocking of the door. An attempt was made to break open the door. At about 3:00 A.M. when the informant went to attend the call of nature in the bath room which was made inside the house, then he found the sound of knocking of the door which was closed. The further case is that he came out of the bath room and started doing his exercise in the bigger room. In the meantime, at about 3:30 A.M. two miscreants entered into the house breaking open the wooden door and caught hold of the wife of the informant and assaulted her and tied her with clothes and when on hearing Hulla he went there then the miscreants also caught hold of him, assaulted him and tied his hands and legs with the clothes and rope and thereafter they dragged the informant and his wife and demanded to give the key of the treasury. When the informant said that there is no treasury in the house then they demanded Rs.10,00,000/- upon which they said that there was no money. On refusal, the miscreants assaulted the informant and his



wife by handle of hand pipe and dagger as a result of which she sustained injuries and snatched her golden Kangan from her hand, golden chain and cash Rs.5,000/- from the bag. Thereafter they entered into the house, ransacked the house and attache and took away the house-hold articles. Besides this, they also took Dish T.V., two mobile sets; one of Nokiya Company and other of LG Company bearing SIM Nos. 9470009643 and 9525200732. Both mobiles were taken away by the miscreants. The further case is that both the miscreants were 25 to 30 years old, out of whom one was of long height and the other was of normal height. Both were wearing shirt, pant, sweater, jacket and had covered their faces by clothes. Only their eyes and noses were visible and they were talking in local language and in the house there were only two miscreants. Other miscreants may be out side the house and they ransacked the house including the boxes and attache and took away the valuables. The further case is that they also assaulted brutally and injured the informant and his wife. It has further been stated that the list of the looted articles will be given later.

4. On the fardbeyan of the informant, First Information Report was lodged and investigation proceeded. P.W.6 Anant Ram is the Investigating Officer of the case. He received information on 08.01.2011 at 7:00 A.M. that there is a dacoity in the house of the informant (P.W.1) in village Koyali. He proceeded for verification of informant, after

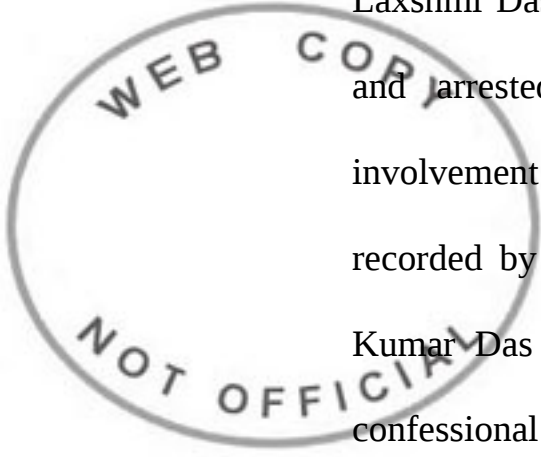
making an entry of Sanha in Diary, he reached the house of the informant, where several persons had collected. He found the informant and his wife injured. They stated that there is occurrence of dacoity in their house. The Investigating Officer has taken the statement of the informant, recorded the fardbeyan and has proved fardbeyan, which is in his writing and signature marked as Ext.1 and 1/1 and has prepared the injury slips and sent them for treatment. He also proved the injury slips marked as Ext.5 and 5/1. On the basis of fardbeyan, Nanpur P.S. Case No. 04 of 2011 was registered and a formal First Information Report was prepared in the writing of literate constable Arvind Kumar, which was signed by him and proved the formal First Information Report marked as Ext.6 and he took the charge of investigation and proceeded with investigation. He has taken the re-statement of the informant and inspected the place of occurrence. He has described the place of occurrence and proved the seizure list which is in his writing and signature marked as Ext.7. Thereafter, requested the technical department of police department for Call Detail Report and CAP of the looted mobile bearing SIM Nos. 9470009643 and 9525200732 and received information that Call Detail Report of the mobile is received for the period from 20.12.211 to 09.01.2011 and last call on Mobile No. 9470009643 was received on 07.01.2011 at 18:06 hours. The mobile no. 9525200732 is in the name of wife of the informant Shail Kumari Devi

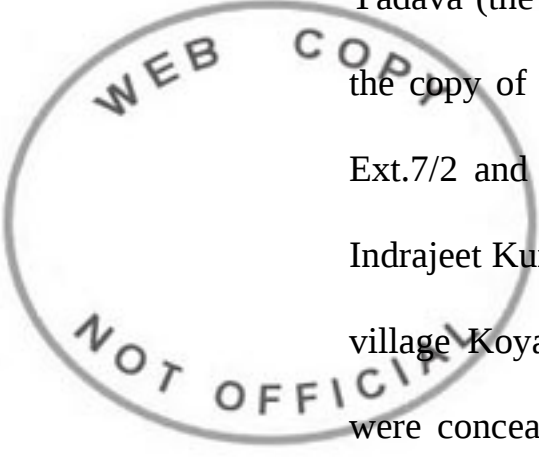


by which a call was received on 08.01.2011 at 18:23 hours by mobile no. 9572499559. It is worthy to note here that only SIM was used, not mobile set, as the looted mobile was of Samsung Company having EMEI No. 358584033775470 while the set on which the looted SIM was used on the mobile set was having EMEI No. 358629014633700 and there was a talk of 523 seconds. Regarding the owner of the SIM of mobile no. 9572499559, the computer operator was requested to furnish print out and CAP of both the mobiles were received by the Investigating Officer.

Print out of mobile no. 9572499559 was from 02.12.2010 to 08.01.2011, which had last call on mobile no. 9525200732 (looted mobile) at 18:22 hours, for a period of total 523 seconds and the owner of the SIM No. 9522499559 is Smt. Kiran Devi, W/o Binod Mandal of village Sonbarsa, House No. 119, Circle Sonbarsa. The Police Officers were sent for arresting this SIM owner. In the evening, Police Officers came with one Shiv Narain Mandal, S/O Satyanarain Mandal with this SIM used in Micromax Cell mobile set. The said Shiv Narain Mandal disclosed that the said SIM is in the name of his elder sister-in-law Kiran Devi, W/o Binod Mandal but the said mobile is with him for the last two months and his Sasural is at village Koyali. His father-in-law is Mohan Das who had a talk with him by mobile no. 9525200732 (looted mobile) and he and his wife had also a talk with his mother-in-law.

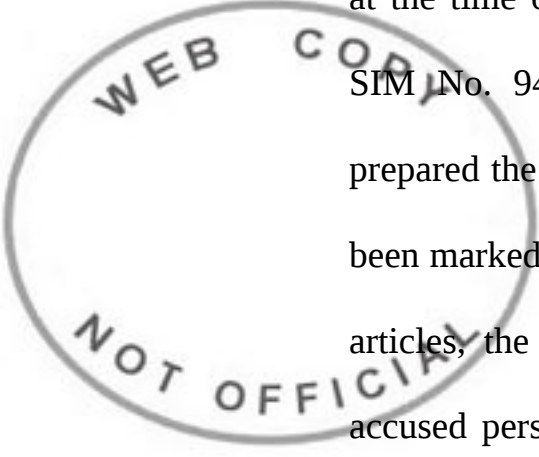
Thereafter, on 12.01.2011, the police raided the house of Laxshmi Das @ Laxmi Kumar Das (the appellant), son of Mohan Das and arrested him. On interrogation, Laxshmi Das accepted his involvement in the occurrence and his confessional statement was recorded by the police which was signed by Laxshmi Das @ Laxmi Kumar Das (the appellant) marked as Ext.8 and in the light of his confessional statement and on his disclosure, mobile set of Samsung Company bearing SIM No. 9525200732 and also some silver ornaments and cash worth Rs.18,650/- were recovered and seizure list was prepared, which was also signed by two independent witnesses, namely, Bijali Pawan and Sundeswar Paswan, copy of which was handed over to Laxshmi Das @ Laxmi Kumar Das (the appellant) and has proved the seizure list marked as Ext.7/1. Laxshmi Das @ Laxmi Kumar Das (the appellant) disclosed the name of his associates Indrajeet Rai @ Indrajeet Kumar Yadava (the appellant) who participated in crime on the basis of which Indrajeet Rai @ Indrajeet Kumar Yadava (the appellant) was also arrested who has also accepted his involvement in the alleged offences and confessed his guilt. His confessional statement was recorded which has been proved as Ext.8/1. In the light of confessional statement of Indrajeet Rai @ Indrajeet Kumar Yadava (the appellant) along with both arrested accused persons, reached village Dadari and on their disclosure, he recovered looted set-up box of D.T.H. Company from the house of





Sanjay Rai, the brother-in-law of Indrajeet Rai @ Indrajeet Kumar Yadava (the appellant), which was seized seizure list was prepared and the copy of seizure list was given to Sanjay Rai which was proved as Ext.7/2 and in the light of confessional statement of Indrajeet Rai @ Indrajeet Kumar Yadava (the appellant), from village Dadari, he reached village Koyali where as per confessional statement, looted ornaments were concealed, which is behind his house which was concealed in a wall which was seized in presence of witnesses and seizure list was prepared which is in his writing and signature, which was signed by witness Bikau Rai and Sanjay Sahni. Copy of seizure list was given to the appellant (Indrajeet Rai @ Indrajeet Kumar Yadava), who proved it as Ext.7/3. Thereafter, he reached village Koyali market and asked about purchasing of mobile from Laxshmi Das @ Laxmi Kumar Das (the appellant) by Md. Dastgir who accepted that mobile was purchased on payment of Rs.500/- from Laxshmi Das @ Laxmi Kumar Das (the appellant) and said mobile set was seized from Md. Dastgir (P.W.5) and proved the seizure list marked as Ext.7/4.

From Koyali market, he again searched the house of both the accused persons and from the house of Indrajeet Rai @ Indrajeet Kumar Yadava (the appellant), said Katta was recovered armed with which Indrajeet Rai @ Indrajeet Kumar Yadava (the appellant) has committed this offence and an old shoe of Laxshmi Das @ Laxmi



Kumar Das (the appellant) was found behind his house which was in use at the time of occurrence and also recovered the full-pant, the another SIM No. 9470009643 was recovered in presence of witnesses. He prepared the seizure list which is in his writing and signature which has been marked as Ext.7/5. Along with both the accused persons and seized articles, the Investigating Officer came to the Police Station and the accused persons were sent for remand. He also proved the seizure list prepared by the police S.I. Md. Jakaria and he proved his writing and signature and signed by the witnesses and was also signed by one Satya Narain Mandal which was proved as Ext.7/6. He also proved the call detail report of mobile no. 9572499559 as well as both looted mobiles which was in 7 pages marked as Ext.9 to 9/6.

P.W.7 Dr. Ram Shankar Prasad found the injury on the person of the informant and his wife and altogether four injuries were found on the person of the informant which are (i) incised injury 1 cm x ½ cm x skin deep, (ii) incised injury on left upper and posterior neck ½ cm x skin deep, (iii) contusion on right thumb 5 cm x 2 cm and (iv) contusion on left brutal region 6 cm x 4 cm. However, all the injuries are simple in nature and injury no. (i) and (ii) were caused by sharp cutting weapon like knife and injury nos. (iii) and (iv) were caused by hard blunt substance. He also found the injury on the person of Smt. Shail Kumari Devi, the wife of the informant which are (i) incised injury

on right perital scalp 1 cm. x ½ cm. x scalp deep, (ii) contusion on left forearm 4 cm. x 4 cm. x'ray of part fracture of distal ulna, (iii) contusion around right eye, (iv) sub-conjunctival haemorrhage on left eye, (v) contusion on right knee 10 cm. x 5 cm. x'ray reveals undisplaced fracture in upper tibia and (vi) contusion on right scapular region 3 cm. x 1 cm. However, injury no. (i) is simple in nature caused by sharp cutting weapon like knife and injury nos. (ii) to (v) are grievous in nature caused by hard and blunt substance. Injury nos. (iii), (iv) and (vi) are simple in nature caused by hard and blunt substance.

5. P.W. 8 Chandra Bhushan Thakur, is the Block Development Officer who conducted the Test Identification Parade and stated that on 15.01.2011, he conducted the Test Identification Parade of the recovered articles in connection with Nanpur P.S. Case No. 04 of 2011 and the witnesses Jagdish Sharma (P.W.1) and Shail Kumari Devi (P.W.2) identified the articles mentioned in column no. 3 of the Test Identification Parade Chart and they have also made their signatures. Ram Chandra Sharma and Ram Pravesh Pandey also signed over it and proved the Test Identification Parade Chart marked as Ext.12. In cross-examination, he accepted that no similar types of materials were kept during Test Identification Parade with the article kept for Test Identification Parade.

6. P.W.9 Ram Pravesh Pandey has deposed that the police has

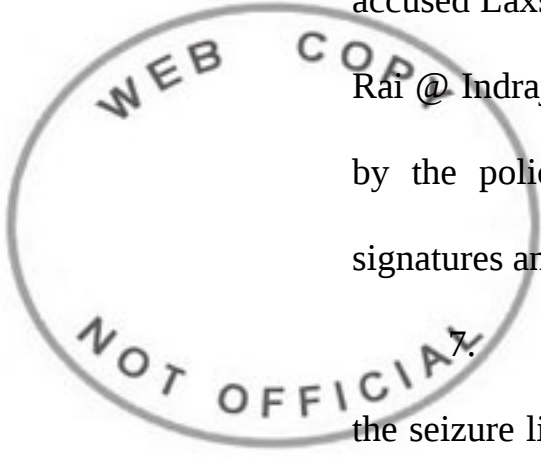
recovered iron katta, black pant, shoe, mobile SIM from the houses of accused Laxshmi Das @ Laxmi Kumar Das (the appellant) and Indrajeet Rai @ Indrajeet Kumar Yadava (the appellant) and prepared seizure list by the police on which he and Sanjeet Kumar Yadav made their signatures and proved his signature marked as Ext.7/5-1.

7. P.W.10 Sanjit Kumar Pandey also proved his signature on the seizure list made for recovery of articles from the house of Laxshmi Das @ Laxmi Kumar Das (the appellant) and Indrajeet Rai @ Indrajeet Kumar Yadava (the appellant) and proved his signature as Ext.7/5-2.

8. P.W.11 Mukesh Kumar Pandey has proved his signatures on the seizure list of recovered mobile from the possession of Md. Dastgir (P.W.5) and proved Ext.7/4-1.

9. P.W. 12 Sundeshwar Paswan has deposed that the police has recovered from the house of Laxshmi Das @ Laxmi Kumar Das (the appellant) and also from his pocket gold, silver, cash and mobile with SIM and prepared seizure list on which he and Bijali Paswan have signed and proved his signature marked as Ext.7/1-1.

10. P.W. 13 Bijali Paswan has deposed that the police has recovered from the house of Laxshmi Das @ Laxmi Kumar Das (the appellant) and also from his pocket gold, silver, cash and mobile with SIM and prepared seizure list on which he and Sundeshwar Paswan have signed and has also proved his signature on that seizure list marked as



Ext.7/1-2.

11. P.W.14 Sanjay Sahni has stated that from the southern wall of house of Indrajeet Rai @ Indrajeet Kumar Yadava (the appellant), gold Kangan, one pair gold Mangal Sutra and one iron Kangan were recovered and seizure list was prepared on which he and Bikau Das have signed and proved his signature marked as Ext.7/3-1.

12. P.W.15 Sonu Kumar Mishra has proved his signature on the seizure list of recovered mobile form the possession of Md. Dastgir (P.W.5) and proved his signature marked as Ext.7/4-2.

13. P.W.3 Manish Chandra Sharma has deposed that he came to know about the alleged occurrence in the morning and went to the house of the informant where he found the wife of the informant lying on the floor and she was tied with Saree and it was told by the informant that two miscreants had come and severely hurt them and had taken away the ornaments and other articles and mobiles from his house. At 3:00 to 4:00 A.M., the police came and prepared seizure list of one knife, one bamboo stick, blood stained Saree and petticoat, Dhoti and bed-sheet and has proved his signature on the seizure list marked as Ext.4.

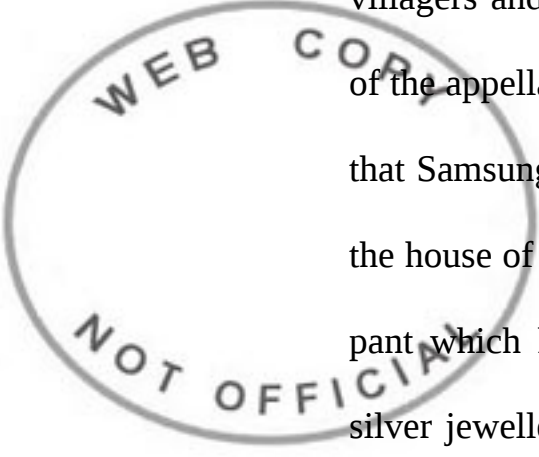
14. P.W.4 Hari Kumar Rai has supported the factum of dacoity as on information about the occurrence in the morning, he reached the house of the informant and came to know that two miscreants have come, hidden their mouth and tied them by Dhoti and cloths and dragged

them in the room and asked about cash and other materials. On saying that there is no cash, the miscreants snatched gold ornaments, cash, Dish T.V. box, two mobiles and caused hurt to them by Danda and knife. On the same day, the police prepared seizure list of knife, Danda, Saree, Dhoti, bed-sheet in carbon processes. This witness has identified his signature marked as Ext.4/1.

15. P.W.5 Md. Dastgir has stated that the police had come at his chicken shop and taken him and asked about his mobile on which he told that he had purchased the said mobile from Laxshmi Das @ Laxmi Kumar Das (the appellant) and police has seized that mobile. He has also identified Laxshmi Das @ Laxmi Kumar Das (the appellant) from whom he had purchased the mobile.

16. Taking into consideration the evidence of the witnesses and considering the oral and documentary evidences, the trial Court convicted the appellants as mentioned above.

17. Learned counsel for the appellants challenged the judgment of conviction and order of sentence recorded by the trial Court. It has been contended that the First Information Report is registered against unknown and no Test Identification Parade of the accused persons has been conducted. The prosecution case as alleged in the First Information Report itself is that two miscreants have entered into the house but had concealed their faces and the accused persons have been identified in the

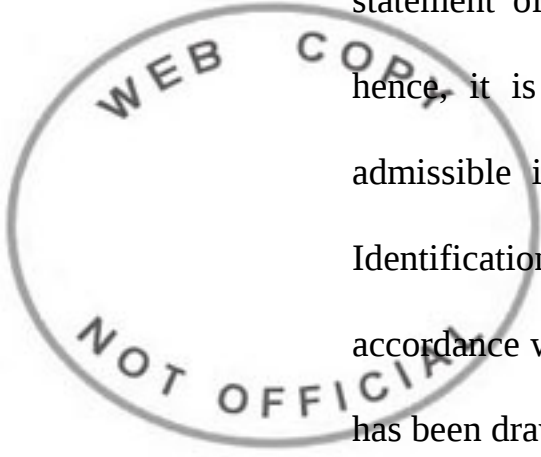


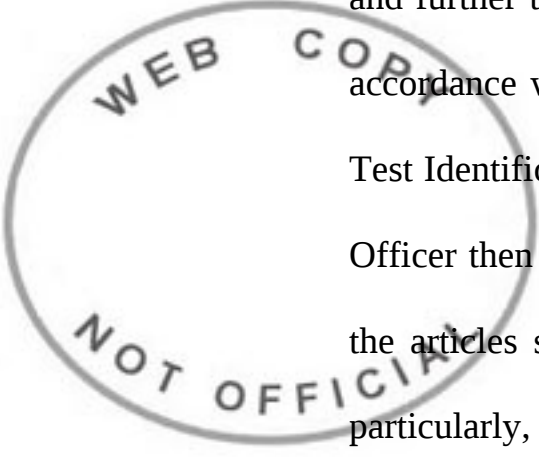
Court and it has also come in evidence that the appellants are the co-villagers and residents of the near vicinity and hence, the identification of the appellants in Court is itself doubtful. It has further been contended that Samsung mobile bearing SIM No. 9525200732 was recovered from the house of Laxshmi Das @ Laxmi Kumar Das (the appellant) from his pant which he was bearing on the date of occurrence along with the silver jewelleryes. It has further been contended that there were seizure list witnesses of the mobile with SIM, which was seized from the pocket of Laxshmi Das @ Laxmi Kumar Das (the appellant) and seizure list was prepared on which P.Ws. 12 and 13 have signed and proved their signatures.

18. However, the criticism raised against the evidence of P.Ws.12 and 13 that the seizure list has not been fully supported by them and deposed that they have no opportunity to go inside the house though supported the prosecution case regarding the search, seizure and recovery of the articles.

19. Learned counsel for the appellants further submits that the seized articles were not produced before the Court though as per the record, the said seized articles were handed over to the informant by order dated 24.08.2011 which were the articles identified in Test Identification Parade and further it has been submitted that though the recovery was made from the house of Indrajeet Rai @ Indrajeet Kumar

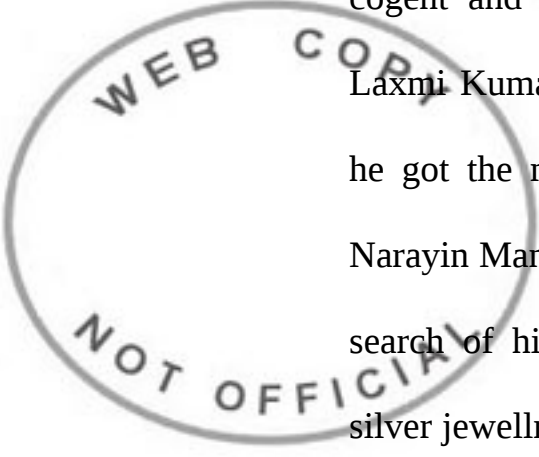
Yadava (the appellant), alleged to have been on the basis of confessional statement of Laxshmi Das @ Laxmi Kumar Das (the appellant) and hence, it is contended that the confession before the police is not admissible in evidence. It has further been contended that the Test Identification Parade conducted of the seized articles was not in accordance with the law provided under the Police Manual and attention has been drawn to the evidence of the Block Development Officer before whom the Test Identification Parade was conducted that the articles given by the police were put on Test Identification Parade one by one and five articles were identified. However, it has further been contended that articles kept for Test Identification Parade were only kept alone and were not mixed up with any other similar type of articles and the Block Development Officer, who conducted the Test Identification Parade, has deposed that all arrangements were made by the Officer-in-Charge and the Test Identification Chart was also prepared by the police officer which bears his signature and hence, it is contended that the authenticity of the Test Identification Parade lost its significance when it has not been conducted in accordance with law. It has further been contended that though the conviction recorded under Sections 307 and 394 of the Indian Penal Code and it has been held that in view of the conviction recorded under Sections 307 and 394 of the Indian Penal Code lost its significance and no separate sentence passed and hence, contended that





when the seizure list witness has not fully supported the prosecution case and further the Test Identification Parade having not been conducted in accordance with law mixing the articles with the other articles and the Test Identification Chart prepared by the Officer-in-Charge or the Police Officer then the conviction on the basis of Test Identification Parade of the articles seized is neither proper nor sustainable in the eye of law, particularly, in view of the fact that the articles seized have not been produced before the Court nor it has been identified by the informant that this is the article which has been looted in the dacoity and hence, the judgment of conviction and order of sentence recorded by the trial Court is not sustainable.

20. Learned counsel for the State, however, countered the arguments made on behalf of the learned counsel for the appellants and stated that the First Information Report is against unknown, but the Call Detail Report and CAP were taken out of the looted mobile bearing SIM No. 9525200732 and it transpires that a talk has been made just after the date of occurrence to mobile bearing SIM No. 9572499559 and it was found that the said mobile 9572499559 belongs to one Smt. Kiran Devi and one Shiv Narayan Mandal disclosed that the mobile belongs to Kiran Devi but the said mobile is with SIM since last two months and he had talked on 08.01.2011 in the evening at 18:22 hours with Laxshmi Das @ Laxmi Kumar Das (the appellant) and subsequently he and his wife had

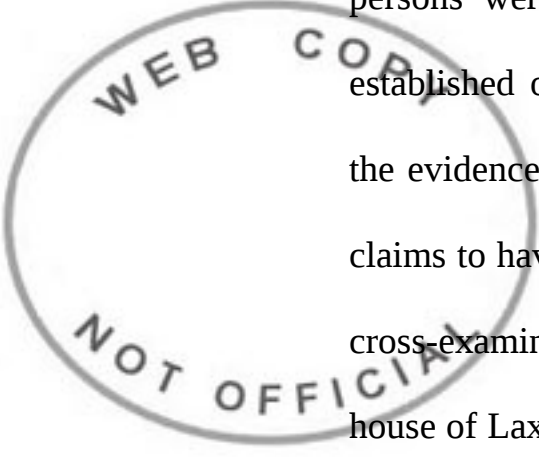


also talked with his mother-in-law and hence, it is contended that there is cogent and reliable evidence of the implication of Laxshmi Das @ Laxmi Kumar Das (the appellant) unless he gave any explanation how he got the mobile bearing no. 9525200732 to have a talk with Shiv Narayin Mandal after arrest of Mohan Das confessed his guilt and on the search of his house SIM 9525200732 was recovered along with the silver jewellries and cash worth Rs.18,650/- on which both the witnesses Bijali Paswan and Sundeshwar Paswan signed and Laxshmi Das @ Laxmi Kumar Das (the appellant) also signed, copy of which was handed over to him. It has further been contended that the co-accused Indrajeet Rai @ Indrajeet Kumar Yadava (the appellant) has also confessed and on his confession and fact leading to discovery some articles were also recovered from his possession on his assertion of getting the looted article near the wall of his house and further the evidence of Md. Dastgir (P.W.5) that he purchased a Nokia mobile from Laxshmi Das @ Laxmi Kumar Das (the appellant) also indicates implication of Laxshmi Das @ Laxmi Kumar Das (the appellant) and Indrajeet Rai @ Indrajeet Kumar Yadava (the appellant). However, evidence is that another looted mobile having SIM No. 9470009643 having been recovered from the possession of Indrajeet Rai @ Indrajeet Kumar Yadava (the appellant) and the seizure list prepared before Sanjit Kumar Pandey (P.W.10) and hence, it is contended that there is

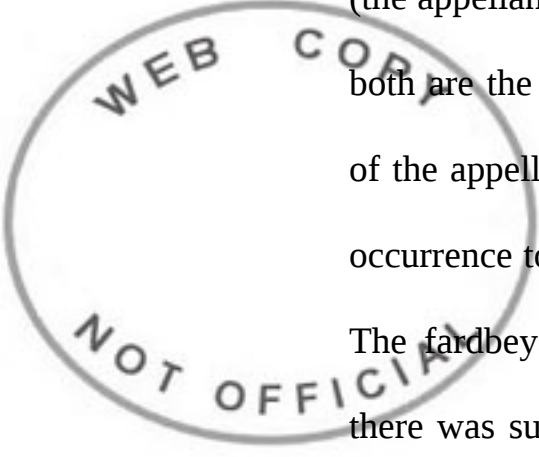
sufficient evidence that just after the occurrence in the night of 07.01.2011 a talk by the mobile bearing SIM No. 9572499559 indicates that just after the occurrence the appellants were in possession of the said mobile and there may be the presumption unless it has no explanation.

21. Taking into consideration the respective submissions of the parties, the question for consideration is whether the prosecution proved the charges beyond reasonable doubt.

22. However, the prosecution case as alleged is that a dacoity was committed in the house of the informant and the appellants brutally assaulted the informant and his wife. The injury report was proved by the Doctor P.W.7 who found the injuries on the informant and his wife. The injured were examined on 08.01.2011 at 10:00 A.M. On the said information, the Investigating Officer reached the place of occurrence and during investigation found the house ransacked. The boxes, attachee and the almirah were got opened and the articles were found thrown and that indicated the factum of dacoity and looting of the articles. However, the most important feature of the case is regarding the identification of the accused as the names of the accused persons have not been mentioned in the First Information Report and it has been asserted only to the effect that the age of the accused persons were 25-30 years and they have concealed their faces and the identification was not proved

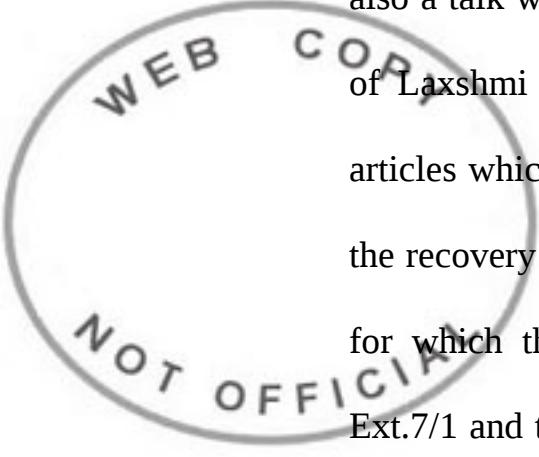


during the investigation as no Test Identification Parade of the accused persons were conducted nor has any Test Identification Chart been established or proved. However, the only material for identification is the evidence of P.W.1. However, P.W.1 in his evidence at paragraph 4 claims to have identified the accused by his name and face. However, in cross-examination regarding the identification he has stated that the house of Laxshmi Das @ Laxmi Kumar Das (the appellant) is about half kilometer. He has further stated that prior to the occurrence he had not identified Laxshmi Das @ Laxmi Kumar Das (the appellant). He has further stated that Laxshmi Das @ Laxmi Kumar Das (the appellant) is not in visiting term. However, in view of the evidence as to how he identified the appellant when the appellant was not known to him prior to the occurrence and his case in the First Information Report that the accused persons had concealed their faces with clothes and only there eyes and nose were visible and further their evidence being that he had identified Laxshmi Das @ Laxmi Kumar Das (the appellant) prior to the occurrence, identification of the appellants by this witness in Court by name does not transpire confidence. P.W.2 is the wife of P.W.1. She has also deposed that he has identified both the accused Laxshmi Das @ Laxmi Kumar Das (the appellant) and Indrajeet Rai @ Indrajeet Kumar Yadava (the appellant) when she stated in the cross-examination that the miscreants had concealed their faces and he could not identify. However,



she claims that she identified Indrajeet Rai @ Indrajeet Kumar Yadava (the appellant) and Laxshmi Das @ Laxmi Kumar Das (the appellant) as both are the co-villagers. Had she identified the appellants? The names of the appellants must be in the First Information Report. However, the occurrence took place in the night in between 07.01.2011 to 08.01.2011. The fardbeyan was recorded on 08.01.2011 at 7:30 A.M. and hence, there was sufficient opportunity for her itself to transpire the names of the appellants. The names of the appellants had not come in the case diary and further regarding the fact that no Test Identification Parade was not conducted and hence, identification of the appellants at the time of occurrence is doubtful.

23. However, second limb of the evidence is that two mobiles were looted away one mobile bearing SIM No. 9525200732. The call details of this mobile were taken out, which are marked as Ext.9 to 9/6. They indicate that there was talk of 523 seconds on 08.01.2011 with mobile no. 9572499559. However, the occurrence is between the night of 07.01.2011 to 08.01.2011 and there was talk on mobile on 08.01.2006 at 18:22 hours with the looted mobile no. 9525200732 and the police during investigation found that mobile no. 9572499559 belonged to one Kiran Devi and one Sheo Kumar Mandal disclosed that the said mobile was missing for last two months and on 08.01.2011 he had a talk by the looted mobile no. 952520073 with Laxshmi Das @



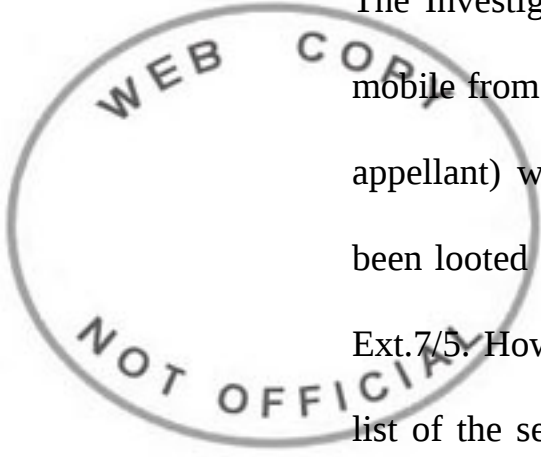
Laxmi Kumar Das (the appellant) and his brother-in-law (Sala) and had also a talk with his mother-in-law and thereafter police raided the house of Laxshmi Das @ Laxmi Kumar Das (the appellant) and recovered articles which included a SIM of looted mobiles 9525200732 as well as the recovery of the second looted mobile bearing SIM No. 9470009643, for which the seizure list was prepared, which has been marked as Ext.7/1 and the Investigating Officer (P.W.6) has proved the seizure list regarding recovery of these articles. The two witnesses, who are witnesses to the seizure, are Bijali Paswan and Sundeshwar Paswan and they have been examined as P.W.13 and P.W.12. They have supported the prosecution case regarding the recovery that from the house of Laxshmi Das @ Laxmi Kumar Das (the appellant) and from the pocket of Laxshmi Das @ Laxmi Kumar Das (the appellant) a mobile with a SIM was seized and the seizure list was prepared before him on which he signed and along with him Bijali Paswan also signed and proved his signature as Exts.7/7-1 and 7/1-2.

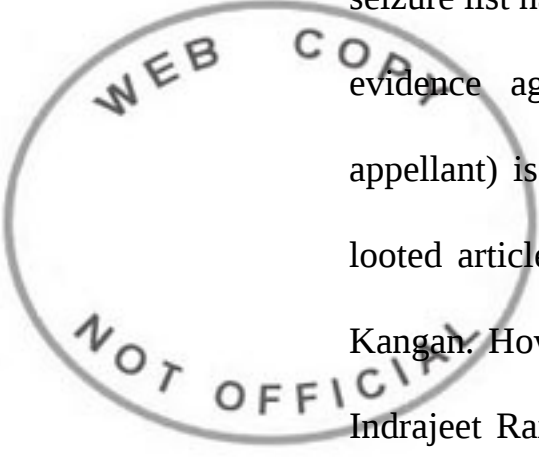
24. However, there is criticism in his cross-examination that he had got the opportunity to enter into the house of Laxshmi Das @ Laxmi Kumar Das (the appellant) and police took the articles from the house of Laxshmi Das @ Laxmi Kumar Das (the appellant). Similarly P.W.12 Bijali Paswan has also supported the prosecution case in examination in chief regarding recovery of SIM, jewellery and proved his signature.

However, he stated that articles seized had not been produced in Court.

The Investigating Officer has further proved the seizure of the second mobile from the house of Indrajeet Rai @ Indrajeet Kumar Yadava (the appellant) which bears the SIM of the second mobile alleged to have been looted from the house of the informant which has been marked as Ext.7/5. However, the seizure list has been prepared. However, seizure list of the seized articles have been prepared jointly from the recovery made from the accused Indrajeet Rai @ Indrajeet Kumar Yadava (the appellant) as well as Laxshmi Das @ Laxmi Kumar Das (the appellant) and looking at the face, it appears that there are some interpolations regarding the recovery of SIM and the witnesses of this mobile Sanjit Kumar Pandey and Ram Pravesh Pandey who are P.Ws.9 and 10. Though mentions have been made about recovery of the Katta, pipe and Shoe but P.W.10 has not stated about the mobile in his evidence. However, in the evidence of P.W.9 there is no mention of mobile SIM.

25. However, the criticism on this recovery is that the seizure list has been prepared jointly with regard to the recovery of looted articles from the house of Indrajeet Rai @ Indrajeet Kumar Yadava (the appellant) and Laxshmi Das @ Laxmi Kumar Das (the appellant). Another limb of the evidence is the evidence of P.W.5 who has deposed that he had purchased the mobile for consideration money of Rs.500/- from Laxshmi Das @ Laxmi Kumar Das (the appellant). He has also





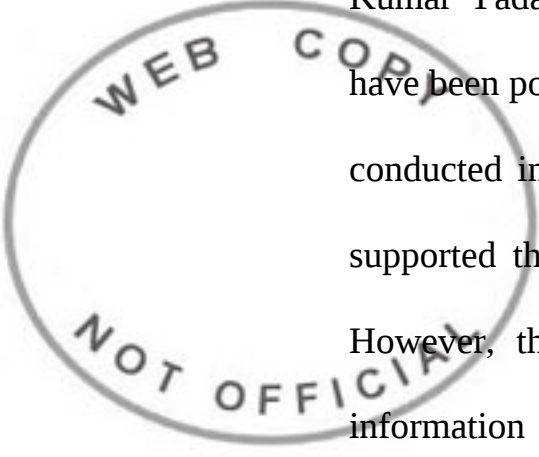
stated that he has prepared the paper for the purchase. However, no seizure list has been prepared with regard to the mobile seized. So far the evidence against Indrajeet Rai @ Indrajeet Kumar Yadava (the appellant) is concerned, the recovery was made from his house of the looted articles, such as, golden chain, Kangan, Mangal Sutra and iron Kangan. However, the recovery has also been made from the house of Indrajeet Rai @ Indrajeet Kumar Yadava (the appellant). The chart of Test Identification Parade has been proved and the Block Development Officer has also been examined as P.W.8 who is said to have conducted the Test Identification Parade of the articles seized and the chart shows that the golden Kangan, golden Mandal Sutra, set-up box, Samsung Mobile and Nokia Mobile were put on Test Identification Parade and were identified as the articles.

26. Moreover the criticism has been made that the Block Development Officer in his evidence has stated that each item was signally identified without having been mixed up with similar items. However, the evidence of the Block Development Officer is in contradiction to the Test Identification Chart, which bears the signature of the Block Development Officer as the chart itself mentions that the articles kept on Test Identification Parade were mixed up with ten similar articles of each nature and hence, this evidence in toto is in contradiction to the Test Identification Chart. However, he has stated

that Test Identification Chart was prepared by the Police Officer and he also signed it.

27. However, going through the entire evidence, it is found that the identification of the appellants in Court does not satisfy the conscience in view of the fact mentioned above that the accused persons were not named in the First Information Report though they are co-villagers and it is stated that they were not known from before or the witnesses were not identifying him since before the occurrence and they had covered their faces and in that view of the matter the identification in Court for the first time does not inspire confidence.

28. The second limb of evidence is that the recovery was made after coming to the knowledge the fact that a talk was made from the looted mobile with SIM No. 9572499559 and it was learnt that the said mobile is of the one Kiran Devi and then talk was made with one Sheo Narayn Mandal and he disclosed that mobile belongs to his Bhabhi Kiran Devi which is being used for the last two months and he has received a call on 08.01.2011 from the looted mobile, by which he talked to his brother-in-law (Sala) Laxshmi Das @ Laxmi Kumar Das (the appellant) and his mother-in-law and on the basis of the said information, raid was conducted and from the house of Laxshmi Das @ Laxmi Kumar Das (the appellant), recovery of the looted article and looted SIM was made and this indicates the implication of Laxshmi Das



@ Laxmi Kumar Das (the appellant) and Indrajeet Rai @ Indrajeet Kumar Yadava (the appellant). However, the various technical defects have been pointed out that the Test Identification Parade having not been conducted in accordance with law and the seizure list witness has not supported the prosecution case regarding the recovery of the articles. However, the evidence of Investigating Officer is that on the said information the name of Laxshmi Das @ Laxmi Kumar Das (the appellant) having been found different and then the raid was conducted and on his disclosure the appellants were also apprehended and on his intimation, recovery was made of the looted articles which were put on Test Identification Parade.

29. However, the criticism is regarding the conduct of the Test Identification Parade or the fact that the seizure list witness has not fully supported the prosecution case. However, the seizure list witness has admitted their signature on the seizure list and the Investigating Officer has proved the recovery hence, the offence under Section 411 of the Indian Penal Code is established. However, a presumption is attached with it regarding the participation of the appellants in Sections 394 and 307 of the Indian Penal Code.

30. Having regard to the fact that the evidence of P.Ws.1 and 2 that they claimed to have identified the appellants does not inspire confidence and there is technical defects pointed out, hence, it is not

proper to hold the appellants guilty for the offences under Sections 394 and 307 of the Indian Penal Code. However, in view of the recovery made and even Test Identification Parade was conducted wherein the witnesses identified, I find and hold that the appellants have been found guilty under Section 411 of the Indian Penal Code. However, I find and hold that the prosecution has proved the case for the offence under Section 411 of the Indian Penal Code. It has been pointed out that the appellants have remained in jail for about three years and four years and more hence, the ends of justice shall be met by sentencing the appellants for the period already undergone and, accordingly, the appeal is allowed in part.

(Gopal Prasad, J)

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