

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No. 284 of 2013

Against the judgment of conviction dated 08.11.2012 and order of sentence dated 09.11.2012 passed by Shri Phool Chandra Chaudhary, the learned Ad hoc Additional Sessions Judge-1, Muzaffarpur in Session Trial No. 127 of 2009/133 of 2009 arising out of Karja P.S. Case No. 65 of 2008, G.R. No. 1098 of 2008

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1. Nizamuddin, S/O Januladdin @ Md. Zaimul Abdin, Resident of Village - Harpur Ratwara, P.S. - Saraiya, District - Muzaffarpur
 2. Govind Das, S/O Late Kusai Das, Resident of Village - Shobhan, P.S. - Simari, District - Darbhanga

.... Appellants

Versus

1. The State of Bihar

.... Respondent

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Appearance :

For the Appellants : Mr. Karandeep Kumar, Advocate

For the Respondent : Mr. Bipin Kumar, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

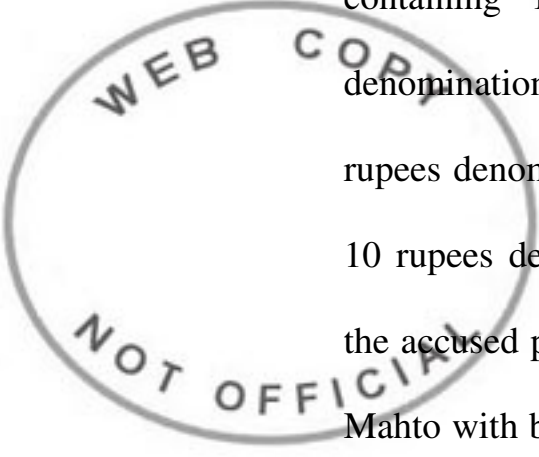
Date: 11-12-2015

Heard learned counsel for the appellants and the State.

2. The appellants have been convicted under Section 395 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years with a fine of Rs.10,000/- and in default of payment of fine to undergo imprisonment of one year. Appellants have further been convicted under Section 120B of the Indian Penal Code and sentenced to undergo rigorous imprisonment for five years with a fine of Rs.5,000/- and in default of payment of fine to undergo imprisonment of six months. 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 Awadhesh Kumar Mishra, the Branch

Manager, North Bihar Gramin Bank situated at Barka Gaon, is that on 27.06.2008 at around 2:45 P.M. he locked the cash in safe after verification. The bank staff were engaged to maintain register. He came out at the Varanda of the Bank. At 2:55 P.M. two persons entered into the bank wearing Lungi and Ganji. One person had slight Nepali complexion and other looks like labourer having age between 25 to 30 years. They captured the informant on the point of pistol and demanded to deliver the key of the cash. He put resistance thereafter one of them struck on his head by Butt of the pistol and took him in the room and demanded key of the safe. Their two associates aged about 25 to 30 years were wearing pant and T-Shirt, height about 5'5" feet. They were speaking local language. All the four persons were armed with pistol. They covered the bank staff in the room and forced the cashier Umesh Kumar Singh to open the safe and then the Cashier opened the door. One of them having bag filled the same with note from the safe. They also asked for their mobile. In the meantime, Chaukidar Dhanai Mahto (P.W.5) entered into the bank. One of the inmates struck the Chaukidar by the Butt of the pistol and exhorted to shot down to the Chaukidar. Thereupon, the Cashier requested them not to shot at Chaukidar as they had already taken the cash. The other Chaukidar Sathu Paswan (P.W.4) disclosed that the criminals were six in number and they were fleeing on three motorcycles towards north. The safe of the bank was found



empty as they took away entire cash amount worth Rs.3,82,875=50 containing 10 notes of 1000 denomination, 700 notes of 500 denomination, 108 notes of 100 rupees denomination, 45 notes of 50 rupees denomination, 11 notes of 20 rupees denomination, 59 notes of 10 rupees denomination and change of Rs.15=50. In this occurrence, the accused persons also assaulted Baijnath Sah and Chaukidar Dhanai Mahto with butt of the pistol as a result of which they sustained injuries and also assaulted Radha Mohan Thakur and Cashier Umesh Chandra Singh with slaps and fists. The informant claimed to identify the culprits who came in the bank with open face.

4. The fardbeyan of the informant, Awadhesh Kumar Mishra was recorded by the S.I., Shailesh Kumar Sharma on 27.06.2008 at 3:45 P.M. at Barki Gaon, Uttar Bihar Gramin Bank. On the basis of the fardbeyan, First Information Report was drawn and investigation proceeded. During investigation, two motorcycles were recovered from the house of appellant no. 1 and cash recovered from the house of Santosh Kumar. The Test Identification Parade of the suspects was made and two witnesses Dhanai Mahto (P.W.5) and Sathu Paswan (P.W.4) claimed to have identified the accused. During Test Identification Parade Sathu Paswan (P.W.4) claimed to have identified appellant no. 1 and Dhanai Mahto claimed to have identified appellant nos. 1, 2 and Anil Pandey before P.W.9 Sri Lal Bahadur, Judicial

Magistrate and consequently charge-sheet was submitted, cognizance taken, case committed to the Court of Sessions. After commitment, charges were framed against several accused persons seven in numbers including the two appellants and trial proceeded.

5. During trial, ten witnesses were examined by the prosecution.

6. P.W.1 Surendra Rajak is the seizure list witness who proved his signature on the seizure list which has been marked as Ext.1. However, he has been declared hostile as he has stated that nothing has been recovered before him.

7. P.W.2 Vijay Kumar is also the seizure list witness. He has proved his signature on the seizure list which has been marked as Exts. 1/2 and 1/3, but in cross-examination he has stated that Daroga Jee took his signature on the plain paper and nothing has been recovered before him.

8. P.W.3 Ram Pravesh Shahi deposed that on hearing Hulla he got up while he was sleeping at the temple by the side of the bank and Dhanai Mahto (P.W.5) was being assaulted by the accused persons with slaps and fists. He has stated that later he learnt that cash of the bank worth Rs.2-3 lacs was looted. However, he has stated in his cross-examination that he had not identified any of the accused persons.

9. P.W.4 Sathu Paswan has deposed that six persons on two

motorcycles were fleeing away after looting the bank and claimed that out of them he identified one person Sahabuddin. Again he stated that he identified appellant no. 1. However, it has been noted that this witness identified appellant no. 1. However, in his cross-examination in paragraph 3 he has stated that he had seen six persons on two motorcycles, but he could identify only one and at that time he was standing on road to the east of the bank and when he heard hulla that the dacoits were fleeing away then he saw six persons fleeing away.

10. P.W.5 Dhanai Mahto has supported the prosecution case about the dacoity. While he was on duty four persons came inside the bank with the revolver and assaulted him with the butt of the revolver and thereafter they also assaulted the Manager and the peon of the bank and then the four culprits looted the bank, came out side the bank and thereafter fled away on two motorcycles and he claims that he identified three out of the four accused persons. Out of three one accused Nijamuddin identified by the witness is present. However, he has stated that after seeing the accused he can identify rest of the two accused and hence, he only identified the appellant no. 1 in dock.

11. P.W.6 Sanjay Kumar, the Doctor has identified the injured who received injury during the dacoity and after primary treatment of the injured, referred to the Sadar Hospital.

12. P.W.7 Awadhesh Kumar Mishra, the informant has

supported the prosecution case regarding the dacoity, but has not identified any of them and when he was assaulted by the miscreants on the head with the butt of the gun then he fell down and taken to the Doctor and after primary treatment referred to the Sadar Hospital and when he got consciousness, he learnt that about Rs.3,82,000/- and odd has been looted away by the dacoits from the bank hence, he has not identified any of the accused.

13. P.W.8 Sri Arvind Kumar Singh, the Railway Judicial Magistrate, Patna examined as a witness by the prosecution who had conducted the Test Identification Parade. He conducted the Test Identification Parade of accused Anand Pathak, Rakesh Pathak and Lalan Paswan in which both the witnesses Dhanai Paswan and Sathu Paswan did not identify the accused persons.

14. P.W.9 Sri Lal Bahadur, the Sub-Divisional Judicial Magistrate, Sherghati conducted the Test Identification Parade of the accused persons in which Sathu Paswan (P.W.4) identified the accused Nizamuddin whereas the witness Dhanai Mahto (P.W.5) identified the accused Nizamuddin, Govind Das and Anil Pandey.

15. P.W.10 Animesh Chandra Gyani is the Investigating Officer. He recorded the further statement of the informant, inspected the place of occurrence, recorded the statement of the witnesses, recovered two motorcycles from the house of appellant no. 1 and also

recovered money from the house of one Santosh Kumar, conducted the Test Identification Parade and after investigation submitted charge-sheet.

16. The trial Court taking into consideration the evidence of the witnesses, convicted the appellants for the offence under Sections 395 and 120B of the Indian Penal Code and acquitted the other accused persons holding that no offence under Section 395 of the Indian Penal Code is made out. However, the conviction recorded only on the evidence of P.Ws.4 and 5 holding that they are wholly reliable and trustworthy as there is no reason to discard their evidence.

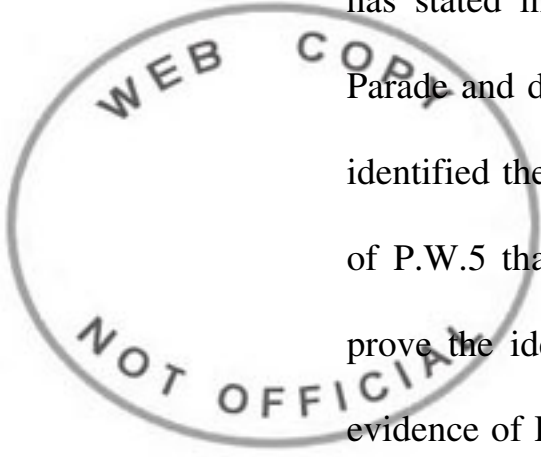
17. Learned counsel for the appellants, however, challenged the judgment of conviction and order of sentence. He submits that only material requires to be looked into regarding the identification of the accused. He further submits that conviction has been recorded on the basis of the evidence of the witnesses placing reliance on the identification of P.Ws.4 and 5 who claimed to have identified the accused and the accused was brought and kept at the police station and the possibility of witnesses having seen the accused cannot be ruled out. However, the evidence of P.Ws.1, 2, 3 are of no consequence. P.Ws.1 and 2 are the seizure list witnesses who have not supported the seizure list to have been prepared before them. P.W.3 supported the prosecution case regarding the dacoity. He has stated that he only learnt

that the cash of the bank was looted and the accused persons fled away.

He has not identified any of the miscreants. P.W.4 Chaukidar in his evidence has claimed to have seen one person and he named him but the Court has recorded that he identified Nizamuddin the appellant no. 1 who is stated to have been in the occurrence. However, in his evidence he has not stated that when he identified the accused and what act of commission and omission was being done by him while he identified him. This witness has not deposed with regard to the fact that he saw the occurrence, but with regard to the fact that he saw the appellants while they were fleeing away and his deposition is to the effect that this witness was standing on road to the east of the bank and then he heard the sound of hulla that dacoits were fleeing and then he claimed that he saw this person fleeing away and he has stated that he does not remember that they covered their face by towel or not. It is apparent that this witness claims to have identified the miscreants while they were fleeing away. This witness cannot say that Daroga Jee kept the appellant no. 1 for two days. Hence, this witness is not saying that he saw the accused persons while they were committing dacoity, but he claims that he saw the accused persons while fleeing away.

18. P.W.5 is Dhanai Mahto. He stated in his evidence that he identified the appellant no. 1, who was present in Court and hence, the only identification by this witness is the identification of appellant no. 1

and he did not identify the appellant no. 2 in Court. However, P.W.9 has stated in his evidence that he conducted the Test Identification Parade and during the Test Identification Parade P.W.5 Dhanai Mahto identified the appellant no. 1 and 2 and Anil Pandey, but the evidence of P.W.5 that he identified only appellant no. 1 does not dissolve to prove the identification which is substantive evidence. However, the evidence of P.W.9 that Dhanai Paswan had identified the appellants in Test Identification Parade has got only corroborative value and it cannot be substantive piece of evidence and hence, this very fact of identification in Test Identification Parade cannot be substantiated for identification in Court cannot be substituted by proving the Test Identification Chart or evidence of the Magistrate who conducted the Test Identification Parade to prove the identification as witnesses have identified in Court as this has got only a corroborative value. The other witness P.W.6 is Doctor who has only claimed to have examined the injured who received injury during the dacoity and hence, his evidence is not material. Similarly, the evidence of P.Ws.8 and 9 the Railway Judicial Magistrate and the Sub-Divisional Judicial Magistrate who conducted the Test Identification Parade is the only material for consideration for the offence under Section 395 of the Indian Penal Code. However, the two persons who identified the accused are the Chaukidars and P.W.5 has accepted that the accused was apprehended



and kept in the police station and hence, the opportunity of seeing the accused at Police Station by P.Ws.4 and 5 cannot be ruled out and further P.W.3 stated that he identified while he was fleeing away and P.W.5 also has not stated specifically that at the time of occurrence what act of commission and omission was being done by the appellants. He has only stated that he saw them fleeing away and they fled away on two motorcycles.

19. Hence, having regard to the fact that no particular act of commission and omission whispered and simply the evidence that Daroga Jee has brought the appellant no. 1 to the police station after catching hold of him, the possibility of P.Ws. 4 and 5 having seen the appellant no. 1 prior to the Test Identification Parade cannot be ruled out and the evidence regarding the identification by P.Ws.4 and 5 apparently appears to be doubtful and further the fact that the identification conducted in the Court of appellant no. 1 but none of the witnesses who identified him disclosed that at the time of commission of offence what act was being done by him. So far appellant no. 2 is concerned, there is no substantive piece of evidence against him. He was not identified by the witnesses in the Court and only material against him is his identification in the Test Identification Parade which has corroborative value and in absence of identification by the witnesses in the Court mere proving the Test Identification Chart or

evidence of the Magistrate that the person was identified in the Court is not a substantive evidence and on that basis conviction and sentence cannot be recorded as participation of the appellants in the occurrence has not been proved.

20. I find and hold that the prosecution has not been able to prove the charges beyond all reasonable doubts and accordingly, the judgment of conviction dated 08.11.2012 and order of sentence dated 09.11.2012 passed by Shri Phool Chandra Chaudhary, the learned Ad hoc Additional Sessions Judge-1, Muzaffarpur in Session Trial No. 127 of 2009/133 of 2009 arising out of Karja P.S. Case No. 65 of 2008, G.R. No. 1098 of 2008 are hereby set aside and the appeal is allowed. Both the appellants, who are in custody, be released forthwith if not wanted in any other case.

(Gopal Prasad, J)

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