

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.297 of 2012

Against the judgment of conviction dated 18.02.2012 and order of sentence dated 22.02.2012 passed by Sri Ram Prakash, learned Additional Sessions Judge-F.T.C.-6, Saharsa, in Sessions Trial No. 88 of 2010 (arising out of Sonbarsa Raj P.S. Case No. 56 of 2009 G.R. No. 1076 of 2009).

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1. Bijli Yadav, Son of Sikendar Yadav @ Siko Yadav Resident of Village- Tamkulaha, P.S.- Basnahi, District - Saharsa
 2. Chandan Yadav, Son of Naresh Yadav Resident of Village - Rakhauta, P.S.- Sonbarsa Raj, District- Saharsa

.... Appellants

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellants : Mr. Ram Sumiran Rai, Advocate.

Ms. Anita Kumari, Advocate.

For the State : Mr. Sujit Kumar Singh, Advocate.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD
ORAL JUDGMENT

Date: 05-04-2016

Heard learned counsel for the appellants and learned counsel for the State.

2. This appeal arises out of the judgment of conviction dated 18.02.2012 and order of sentence dated 22.02.2012 passed by Sri Ram Prakash, learned Additional Sessions Judge-F.T.C.-6, Saharsa, in Sessions Trial No. 88 of 2010 (arising out of Sonbarsa Raj P.S. Case No. 56 of 2009 G.R. No. 1076 of 2009) by which the appellants had been convicted for offence under Sections 396 of Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years each and payment of fine of Rs. 5,000/- each. The appellants had further

been convicted for offence under Section 397 and sentenced to undergo rigorous imprisonment for eight years each. Further ordered if the fine had not been paid then sentenced to additional imprisonment for three months each. Further ordered both the sentences to run concurrently.

3. The prosecution case as alleged in the First Information Report by the informant Mantun Yadav (P.W.6) that on 17.06.2009 at about 3.00 P.M. he was going on a motorcycle with Ablesh Yadav and Suresh Yadav who was sitting as a pillion rider to see the daughter of Late Umesh Yadav of Village- Gajipaina for the purpose of marriage of his cousin brother Arbind Yadav. The motorcycle was being driven by the informant and when the informant reached at the bridge in between Biratpur Banshbitti and Manawara Village, he was apprehended by three persons on a motorcycle and he identified three persons as Chandan Yadav, Raghu Yadav @ Rogaha and Rinka Yadav. They pointed pistol to apprehend them. Thereafter from the east Sattan Yadav and Bijli Yadav also came there on a horse and in the meantime 2-3 unknown persons came out from the nearby maize field to whom he did not identify. Further case of prosecution that all the accused persons surrounded the informant and his party and assaulted by slaps and fists and Chandan Yadav snatched Rs. 350/- from the informant and Rinka Yadav snatched mobile and money from the pocket of Ablesh Yadav. Further case is that Chandan



Yadav, Raghu Yadav and Rinka Yadav started snatching the motorcycle from the informant then Ablesh Yadav and Suresh Yadav protested. On the said protest, Chandan Yadav took out his pistol and fired at Ablesh Yadav which hit on his head by which Ablesh fell down immediately and Rinka Yadav fired at Suresh Yadav which caused injury on his arms and chest. Further case is that Raghu Yadav @ Rogaha also fired at the informant but the fire did not hit the informant. On hearing the sound of firing, people started collecting from all the four sides then all the accused persons flee away. Further case is that due to injury on the head of Ablesh Yadav by fire arm of miscreants he fell down and died at the spot. Suresh Yadav was taken by his brother-in-law Shambhu Yadav who reached there on motorcycle and taken him to Madhepura for his treatment.

4. Fardbeyan of Mantun Yadav was recorded by S.I., Shri S. P. Singh of Sonbarsa on 17.06.2009 at 7.45 P.M. (19.45 hours). After Fardbeyan, F.I.R. lodged on 17.06.2009 at 22.00 hours (10.00 P.M.). The distance between P.O. and P.S. is 9 kilometers. Investigation proceeded. During investigation, the I.O. recorded further statement of the informant and inspected the P.O. After investigation, the police submitted charge sheet. Cognizance taken and case was committed to the Court of Sessions.

5. During trial, eight witnesses were examined by the prosecution. P.W. 1 is Suresh Kumar Yadav, P.W.2 is Bimlesh

Kumar Yadav, P.W. 3 is Shambhu Yadav, P.W.4 Mukesh Yadav, P.W.5 is Ram Chandra Yadav, P.W. 6 Muntun Yadav, the informant, P.W.7 Dr. Bijay Pd. Modak who conducted post mortem examination on the person of Ablesh Yadav and found the following injuries;

(i) irregular in shape 3"x2" with bone deep irregular margin blood and brain tissue coming out through this wound at the right temporal area of scalp with blackened area around this wound, (ii) swelling of size 5"x5" on the left side of the scalp above the left ear. X-ray of scalp A.P. and L.T. view done at (a) shows fracture of right temporal bone, (b) fracture of frontal bone, (c) fracture of left parietal bone and (d) fracture of occipital bone followed shadow was seen in side of cranial cavity at the occipital area and it has been opined that cause of death due to injury on the vital organ brain and hemorrhage as a result of fire arm and time elapse since death from the time of post mortem examination between 12 to 24 hours

and P.W.8 is Shiv Narayan Thakur, the I.O. of the case.

6. The defence has adduced one witness as D.W. 1 Mahanthi



Yadav and he deposed that on 17.06.2009 while he was going to Sonbarsa for purchase of fertilizer then he met Sattan Yadav and Ablesh Yadav and his alias name is Raghu Yadav then all were took tea and thereafter, he went to purchase fertilizer and both of them started purchasing articles and about half past four, three persons came together and went to their house. After 4-5 hours he learnt that Ablesh and Sattan have been falsely implicated. So defence set up by false implication of the accused persons.

7. The trial court taking into consideration the evidence of witnesses P.W. 1 Suresh Yadav who had supported the prosecution case and stated that witnesses have seen the accused persons fleeing away from the place of occurrence and had also identified them. There is specific evidence that deceased Ablesh Yadav died due to fire arm injury. Suresh Yadav had specifically stated that Chandan fired which hit his brother Ablesh who died at the spot. Hence the prosecution has been able to prove the charges against the appellants and convicted and sentenced the appellants.

8. Learned counsel for the appellants however challenged the order of conviction and sentence recorded by the trial court on the sole ground that that prosecution has not able to prove the charges. It has been submitted that, though, in the First Information Report, there is allegation that accused persons apprehended the informant along with witness P.W. 1 Suresh Yadav and deceased Ablesh Yadav who were



coming on motorcycle and there is allegation that accused persons fired and thereafter, snatched money from the pocket of the informant as well as snatched mobile from the pocket of deceased Ablesh Yadav. It has further been contended that when Suresh Yadav P.W. 1 protested for snatching of motorcycle then they shot fire causing injury. But the informant, P.W. 6 Mantun Yadav had not supported the prosecution case regarding snatching of articles nor Suresh Yadav deposed regarding any snatching from the pocket of the informant in his deposition. Hence, evidence regarding snatching of the articles at the place of occurrence is either missing or even not reliable or trustworthy for conviction. It has further been contended that statement of witnesses regarding accused persons resorted firing even causing injury to the prosecution party and assault, even one of the person died at the spot, but to prove the ingredient for offence under Section 396 and 397 of Penal Code, it is require to prove dacoity and robbery with murder or using the deadly weapon during dacoity has to be proved. Further if ingredient of robbery and dacoity under Section 396 of Penal Code had been proved then conviction under Sections 396 and 397 of Penal Code has been recorded, whereas Section 396 of Penal Code provides “ dacoity with murder and Section 397 of Penal Code provides “robbery or dacoity with attempt to cause death or grievous hurt. Hence it is contended that dacoity or robbery has not been established. Therefore, conviction under Sections 396 and 397 is

not sustainable. Further the prosecution party neither supported the prosecution case nor any reference has been made for offence under Sections 302 and 307 of Penal Code can be recorded. Hence charge under Sections 396 and 397 of Penal Code as ingredient of robbery and dacoity has not been established then conviction recorded by the trial is not sustainable.

9. Learned counsel for the State however contends that there were evidence which shows firing by accused persons causing injury to the prosecution party and even death of one of the prosecution party.

10. However, going into the question on the submission made by the parties here allegation in the First Information Report itself that while prosecution party was going on the motorcycle they were apprehended by a group of persons of three and two persons came on horse and 2-3 persons came out from maize field. Thereafter, they surrounded and snatched money and mobile even attempt was made to snatch the motorcycle and when protest was made for snatching the motorcycle then miscreants resorted firing causing injury to one of the person who died at the spot by the said fire arms injury. However, going into the evidence of eight witnesses and as per prosecution case, the informant P.W. 6 was going along with Suresh Yadav, P.W. 1 and deceased Ablesh Yadav in the meantime they were apprehended by the accused persons. However, evidence of P.W. 6 Mantun Yadav,

though, come to support the prosecution case, but in his evidence he has stated about firing by which Ablesh Yadav received injury on his head and succumbed to injury at the spot and Suresh Yadav also got injury on his arms and chest, but this witness did not whisper regarding any snatching even deposed that no attempt was made by the accused persons for snatching money or mobile.

11. P.W. 1 is Suresh Kumar Yadav also one of the persons who was coming on motorcycle along with the informant (P.W.6) and deceased ablesh Yadav and he also claimed to be eye witness to the occurrence. In his evidence he had stated that he along with informant Mantun Yadav and deceased Ablesh yadav were going on motorcycle bearing No. B.R.43A 4367 at about 3.00 P.M. when reached at the bridge Manwahara Bansh Bitti they were surrounded by Rinka Yadav, Chandan Yadav, Raghu Yadav, Bijli Yadav and Sattan Yadav. Chandan Yadav shot fire and snatched mobile and money. Sattan Yadav ordered to kill on which Chandan Yadav fired then this witness conceal his head which hit on the head of his brother Ablesh Yadav. Raghu Yadav also shot fire which hit on his chest and he started fleeing away then Bijli Yadav shot fire which hit on his right arm. However, in the entire cross-examination on the part of his evidence regarding snatching mobile and money is missing except suggestion that no occurrence as alleged in the Fardbeyan has been occurred and the accused persons have falsely been implicated in this case due to



political rivalry and enemy. However, this witness in paragraph 16 had stated that there is no family enmity between accused Bijli Yadav, Chandan Yadav with this witness. However, taking into consideration the evidence of P.W. 1 with regard to occurrence of snatching, though, he has deposed that Chandan fired and consequently snatched money and Raghu Yadav snatched mobile. However, there is no mentioned from whom mobile snatched and from whom money was snatched whereas the case of the prosecution in the Fardbeyan that while the informant along with this witness coming on motorcycle they were apprehended. Thereafter, they were abused and assault and Chandan Yadav snatched Rs. 350/- from the informant thereafter, Rinka Yadav snatched money and mobile from the pocket of Ablesh Yadav and when Chandan and Raghu started snatching motorcycle then there were protested then Chandan Yadav shot fire causing injury on the head of Ablesh Yadav who died at the spot. Rinka Yadav shot fire on Suresh Yadav causing injury on his chest and Raghu Yadav also fired on the informant, but it did not hit, hence, the sequence of occurrence as alleged in the Fardbeyan and sequence of manner in the evidence is contradictory as in the F.I.R., the firing was made after snatching of money and mobile, but in the evidence, the firing was made after snatching the money and mobile and during attempt for snatching the motorcycle, the evidence adduced by Suresh Kumar Yadav that mobile was snatched and Raghu Yadav snatched money,

but he has not mentioned from whom mobile was snatched and from whom money was snatched. P.W. 2 Bimlesh Yadav in his evidence of snatching is concern, he had not been eye witness to the occurrence as in his evidence he had stated that when he reached at the P.O. Suresh Kumar Yadav disclosed that Bijli Yadav, Chandan Yadav Raghu Yadav and Sattan Yadav, surrounded. However, he has not whisper about snatching of mobile and money and in his cross-examination he did not see any person assaulted. Hence he is neither see the occurrence of firing nor snatching of mobile and money and evidence of this witness without any consequence. P.W. 3 has also stated that he went at the place of occurrence after he heard the sound of firing and saw that Suresh Yadav is injured state fallen on the ground and Ablesh Yadav died at the spot and both were received fire arm injury. He has further stated that Chandan, Bijli, Raghu and Rinka were seen fleeing away. Hence, his evidence was also not corroborative to the prosecution except he saw the accused persons fleeing away, but snatching of money and mobile has not been mentioned. P.W. 4 in his evidence has stated that Naresh Yadav and Mahendra Yadav brother and father of Suresh Kumar Yadav disclosed that Rinka Yadav and Chandan Yadav apprehended the vehicle and Chandan fired. However, neither Naresh Yadav nor Mahendra Yadav had been examined. Hence, evidence of P.W. 4 is hit by hearsay and not admissible in evidence. P.W. 5 had stated that he heard sound of



firing then he went to the P.O. he saw Suresh and his brother were injured state. He had deposed that when he reached at the place of occurrence after heard the sound of firing saw Ablesh Yadav died at the spot and Suresh also injured state fallen on the ground then Suresh Yadav disclosed that while they were coming on vehicle they were apprehended by Chandan, Sattan, Bijli and Rinka and they were fleeing away. However, there is nothing in the evidence of this witness regarding snatching of mobile and money. P.W. 6 is the informant, P.W. 7 is the doctor and P.W. 8 is the I.O.

12. Hence, going into the case of the prosecution in the Fardbeyan regarding manner of occurrence that accused persons were apprehended the informant and his associates which was disclosed by P.Ws. 1, 2, 3 and 4. However, P.W. 6, the informant had turned hostile and had not been supported the prosecution case as mentioned in the Fardbeyan. There was only evidence of P.W. 1 Suresh Kumar Yadav and his evidence regarding snatching is concern shown to be vague as no matrix in consequence with the prosecution case as mentioned in the First Information Report. In the First Information Report it does not specifically mention that accused persons were surrounded the prosecution party when they were coming on motorcycle. The prosecution party assaulted by slaps and fists by the accused persons then money of the informant and mobile from the pocket of Ablesh Yadav snatched by Rinka Yadav. Further attempt



was made to snatch the motorcycle and when protest was made then Chandan Yadav shot fire causing injury to Ablesh Yadav. However, P.W. 1 in his evidence had not deposed regarding any attempt was made for snatching the motorcycle and consequently firing, causing injury on the head of Ablesh Yadav by which he succumbed to injury. Hence, snatching the money and mobile is missing. Further, though, P.W. 1 had deposed that mobile and money was snatched by the accused persons, but there is no mentioned from whom money was snatched. Further, there is no evidence in deposition of the witnesses that any attempt was made to snatch the motorcycle of Suresh Kumar Yadav. It has further been pointed out that there was allegation that occurrence took place while they were coming on motorcycle, but evidence of this witness regarding snatching is of against the manner of occurrence as alleged in the First Information Report. Further there is no corroborative evidence of witnesses as P.Ws. 2,3,4 and 5 who have supported the prosecution case were not eye witnesses to the occurrence rather they had only stated to the effect that they reached at the place of occurrence after the occurrence and saw accused persons fleeing away and they had also stated that, though, Suresh Kumar Yadav disclosed that accused persons had done the occurrence, but there corroboration also suffer from infirmities and there is no mentioned in the disclosure of Suresh Yadav regarding the occurrence and there is no whisper regarding disclosure of Suresh

Yadav with regard to the occurrence about snatching of mobile or money even no witnesses had stated that Suresh Yadav disclosed about snatching of mobile and money and hence there is no consequence with the case of prosecution. Further fact that the informant had turned hostile had not supported the prosecution case regarding snatching of mobile and money, so it cast a serious doubt regarding snatching of mobile and money.

13. However, taking into consideration the entire evidence, though, witnesses have stated that accused persons surrounded while the prosecution party were going on motorcycle thereafter accused persons snatched money from the pocket of the informant and also snatched mobile from the pocket of Ablesh Yadav. Further case is that while the accused persons tried to snatch motorcycle a protest was made on which firing was made. However, P.W. 1 in his evidence had not whisper regarding snatching of money and mobile and when attempt was made to snatch motorcycle a protest was made in consequence there was firing. However, prosecution had not been adduced any evidence that any attempt was made to snatch motorcycle which lead to firing by the accused persons causing injury to the deceased.

14. Having regard to the facts and circumstances of the case, prosecution has not been able to establish the occurrence of snatching of motorcycle which lead to firing by the accused persons as

prosecution has not been able to prove any snatching or dacoity.

15. However, having regard to the fact that cognizance was taken for offence under Sections 396 and 397 of Penal Code even charge had been framed for offence under Section 396 and 297 of Penal Code, but prosecution evidence does not inspire confidence regarding snatching of money or motorcycle and even snatching became doubt then question remains conviction under Sections 396 and 397 of Penal Code is sustained.

16. However, having regard to the fact, though, there was evidence of firing by the accused persons causing injury to the deceased. However, charge has been made for offence under Sections 396 and 397 of Penal Code regarding snatching, dacoity and robbery is required to be established to record conviction under Section 396 of Penal Code. However, there was no cogent, reliable and unimpeachable evidence as such to record conviction or to held that accused persons had committed dacoity or robbery. Since, evidence of dacoity or robbery is missing then conviction under Sections 396 and 397 of Penal Code is not sustainable.

17. However, there evidence that firing was made, but charge had not been made for offence under Sections 302 or 307 of Penal Code to record conviction its amongst to death on pretext to record conviction under Section 302 of Penal Code, but charge for offence under Section 302 of Penal Code had not been framed.

18. Regard being had to the fact, I find and hold that prosecution has not been able to prove the charges beyond reasonable doubt. Hence order of conviction and sentence recorded by the trial court is hereby set aside. As a result the appeal is allowed. The appellants are in jail custody be released forthwith if not required in any other cases.

m.p.
NAFR

(Gopal Prasad, J)

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