

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.340 of 2015

Arising Out of PS.Case No. -95 Year- 2012 Thana -POTHIYA District- KISANGANJ

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1. Ajoy Malakar son of Late Subal Malakar resident of Village Puratan Palli, Police Station Islampur, District Uttar Dinajpur (W.B.).

.... Appellant/s

Versus

1. The State of Bihar.

.... Respondent/s

with

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Criminal Appeal (SJ) No. 370 of 2015

Arising Out of PS.Case No. -95 Year- 2012 Thana -POTHIYA District- KISANGANJ

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1. Ahmad @ Amar Son of Late Mukhtar Ali resident of Bara Kali Bari Road, Police Station - Islampur, District - Uttar Dinajpur (West Bengal)
2. Md. Zahid Son of Kutubuddin resident of Khajurbari, Police Station - Paharkatta, District - Kishanganj

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

(In CR. APP (SJ) No.340 & 370 of 2015)

For the Appellant/s : Mr. Ajay Kumar Thakur,
Mr. Ravi Ranjan,
M/s Babita Kumari, Advocates

For the State : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 07-03-2017

Earlier it was directed that both the Cr. Appeals bearing No. 340/2015 and 370/2015 arising out of common judgment should be listed conjointly but, due to lapses Cr.Appeal No. 370/2015 was not listed analogously and so, it has been, later on, notified and taken up.

2. In Cr. Appeal No. 340/2015, Ajoy Malakar is the appellant while in Cr. Appeal No. 370/2015, Ahmad @ Amar as well as Md. Zahid are the appellants which arose on account of conviction and sentence recorded vide judgment dated 28.04.2015 and order



dated 30.04.2015 passed by 1st Additional Sessions Judge, Kishanganj in Sessions Trial No. 1468/2012 arising out of Pothia PS Case No. 95/2012 whereby and whereunder the appellants have been found guilty for an offence punishable under Section 412 IPC and sentenced to undergo RI for seven years as well as also slapped with fine of Rs. 5000/- in default thereof, to undergo SI for six months additionally, accordingly have been heard together and are being disposed of by a common judgment.

3. On account of recovery of two unknown dead bodies, Pothia (Paharkatta) PS Case No. 95/2012 was registered under Sections 302/201 of the IPC against unknown at the instance of Anwar Hussain ASI, (PW-2) of Paharkatta PS with a disclosure that on getting rumour with regard to presence of two dead bodies in the Badhar of Dehalbari, he entered the same in station diary and proceeded to place of occurrence. After reaching on the spot, he found the dead bodies. There was assemblage of a large number of persons but none of them claimed identification thereof. During course of investigation, as it appears, both the dead bodies were identified to be of driver and Khalasi of a Truck bearing Registration No. WB-25B-9315 and further, the said truck fell victim of road dacoity while was in a way to Guwahati from Kolkata carrying grocery items. Furthermore, it is also apparent that on confidential information, Investigating Officer, PW-14 got an information with regard to involvement of a particular group and one of the members thereof,



Md. Zahid (One of the appellants) was intercepted and further it has been alleged that on interrogation he made inculpatory extrajudicial confessional statement and also disclosed that the booty is kept at the Godown of Sitaram Chaurasia (since deceased) where raid was conducted and items as disclosed in the seizure list were found and seized. It is also evident that apart from apprehension of other accused, one Ajoy Malakar (one of the appellants) was also arrested from whose house items as per seizure list were recovered. It is further evident that during course of TIP, those items were identified by the transporter and consequent thereupon, charge-sheet was submitted against these appellants under Sections 396/412 of the IPC keeping the investigation pending against others and on the basis thereof, cognizance was taken which ultimately facilitated the trial which concluded in a manner, the subject matter of these appeals.

4. The defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 Cr.P.C. is of complete denial of the occurrence as well as false implication at the instance of police. However, neither any DW nor any document has been exhibited on behalf of appellants in their defence.

5. In order to substantiate its case, prosecution had examined altogether 14 PWs out of whom, PW-1, Dr. Rafat Hussain who conducted autopsy over the dead bodies, PW-2, Anwar Hussain, Informant, PW-3, Ali Hussain, PW-4, Sanjay Malakar, PW-5, Gita Sinha, PW-6, Maniruddin, PW-7, Hafizuddin @ Hafiz Anwar, PW-8,



Jamaluddin, PW-9, Dharmendra, PW-10, Purusottam Soni, PW-11, Chandan Sah, PW-12, Kanchan Devi @ Vidya Devi, PW-13, Bablu Thakur, and PW-14, Sunil Kumar. Side by side, also exhibited, Ext-1 Series, postmortem report, Ext-2 Series, inquest, Ext-3 Series, signature of witnesses over respective seizure list as well as inquest reports, Ext-4, list of material exhibit, Ext-5, self statement, Ext-5/1, endorsement thereupon, Ext-5/2, endorsement of SHO, Pothia PS, Ext-6, signature of the then SHO over formal FIR , Ext-7 Series, inculpatory extrajudicial confessional statement of respective accused and Ext-8 Series, respective seizure list. As disclosed above, nothing has been exhibited on behalf of appellants.

6. At an initial stage of the trial, charge was framed against the appellants under Sections 396/412 of the IPC. After proper scrutiny of the evidence having adduced on behalf of prosecution, the learned lower court in para-19 had found that the evidence having been adduced on behalf of prosecution was not at all sufficient to infer complicity of these appellants during commission of the dacoity with murder and on account thereof, acquitted them relating to Section 396 IPC.

7. However, while recording conviction for an offence punishable under Section 412 of the IPC, the learned lower court had dealt with under para-20 of the judgment and further, considering the recovery in pursuance of Ext-7 as well as 8 series and further, visualizing that the recovery in terms of inculpatory extrajudicial



confessional statement is found admissible in terms of Section 27 of the Evidence Act and further, in terms of Section 30 of the Evidence Act, the same was applicable against the other co-accused whereupon, held the appellants guilty for an offence punishable under Section 412 IPC and for that sentenced for.

8. As stated above, FIR was registered against unknown for an offence punishable under Sections 302/201 IPC. During course of investigation, both the dead bodies were identified to be that of driver and Khalasi of a truck bearing No. WB-25B-9315. Furthermore, it has also been brought up on record through PW-14, the Investigating Officer that the transporter had come who disclosed that the aforesaid vehicle was in a way to Guahati from Kolkata carrying grocery items. Then in that event, the prosecution should have brought on record positive as well as conclusive evidence that the truck was looted away by the miscreants and the articles, which were recovered, happens to be booty thereof. From the record, it is evident that not even a single item has been made material exhibit though seizure lists have been exhibited. Furthermore, the prosecution has examined PW-5, Gita Sinha, BDO before whom TIP of the recovered articles were conducted whereupon, T.I. Chart has been exhibited which is found corroborated with the evidence of the PW-14, Investigating Officer but the fact remains that the persons, who at that very moment came to identify the articles have not been examined on behalf of prosecution during course of trial and on account thereof, the event of



TIP is found not at all corroborated and so, the effect of TIP loses its identity for want of proper identification. In likewise manner, due to non examination of those witnesses, the prosecution failed to interconnect that seized articles were being transported over truck as well as happens to be subject matter of dacoity.

09. That being so, the effect of TIP became sterilized whereupon, the finding recorded by the learned trial court identifying the appellants to be guilty for an offence punishable under Section 412 IPC could not survive. Accordingly, the same is set aside. Consequent thereupon, both the appeals are allowed.

10. Since all the appellants are under custody, they are directed to be released forthwith if not wanted in any other case.

(Aditya Kumar Trivedi, J)

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AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	09.03.2017
Transmission Date	09.03.2017

