

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.724 of 2015

Arising Out of PS.Case No. -137 Year- 1990 Thana -Town District- DARBHANGA

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Md. Firoz Kumar @ Kujra @ Ramchandra Mandal Son of Kadir @ Md. Kaji @ Bindeshwar Mandal Residnet of Village - Kujra Toli, P.S. - Babu Barhi, District – Madhubani.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Jagdish Prasad
Mr. Virendra Kumar

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

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CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA

JAISWAL

ORAL JUDGMENT

Date: 07-11-2017

Heard learned counsel for the appellant as well as learned APP for the State on this criminal appeal.

2. This criminal appeal has been preferred against the judgment and order of conviction dated 29.09.2015 and order of sentence dated 30.09.2015 passed by the Additional Sessions Judge-1st, Darbhanga in Session Trial no. 297 of 2009 arising out of Town P.S. Case No. 137 of 1990, whereby the learned trial court convicted the accused Firoz Kumar @ Kujra @ Ramchandra Mandal for the offence punishable under Section 395 of the Indian Penal Code and sentenced him to undergo R.I. for ten years and also slapped him with a fine of Rs. 5,000/- and in default of payment of fine to undergo S.I. for one year.

3. The factual matrix of the case is that Town P.S.



Case No. 137 of 1990 was instituted under Section 395 of the Indian Penal Code against 5-7 unknown miscreants on the basis of fardbeyan of Pawan Kumar Bagaria S/o Prahlad Bagaria, resident of Mohalla-Gulobara P.S. Town District-Darbhanga recorded by S.I. Y.N. Thakur of P.S. Town on 12.08.1990 at 09:30 PM at the residence of informant with the allegation, in succinct that on 12.08.1990 at around 8:15 PM while he was watching T.V. in his house along with his family members and his mother and father was sitting on *gaddi* and his *Munsi* Ram Briksh Sah had gone out to fetch pan parag leaving the gate of *gaddi* opened, in the meantime, 5-7 unknown miscreants abruptly intruded into his *gaddi* and pointed revolver upon his parents. They also slapped his parents. On hulla made by his mother, he rushed to his *gaddi* then two miscreants pointed revolver on him and demanded key. On divulging that key is not with him, 2-3 miscreants entered into his room and took the key from his wife and looted ornaments from almirah, and also looted ornaments of his wife and of his own and cash from cash box then they decamped with booty extending threatening of dire consequences in case of making alarm.

4. The aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted charge-sheet against other accused persons in the case showing Md. Firoz Kumar absconding under Section 395 of the Indian Penal Code.

5. On receiving the charge-sheet and the case diary



and perusing the same, the learned Magistrate took cognizance of the offence against the accused persons and committed the case to the court of sessions as the accused Firoj Kumar was absconding his case was split up and on his subsequent apprehension separate Sessions Trial started against him and on transfer finally the case came in *seisin* of the Additional Sessions Judge-1st, Darbhanga for trial.

6. Charges against aforesaid accused were framed under Sections 395 and 412 of the Indian Penal Code. Charges were read over and explained to him to which he pleaded not guilty and claimed to be tried.

7. To substantiate its case, in ocular evidence, the prosecution has examined altogether six prosecution witnesses namely, Ansu Kumari as PW-1, Sweta as PW-2, Meera Devi as PW-3, informant Pawan Kumar Bajoria as PW-4, Ganesh Sahni as PW-5 and Mithilesh Singh as PW-6. Out of the aforesaid witnesses, PW-6 (Mithilesh Singh) happens to be the formal witness. In documentary evidence, the prosecution has filed and proved several documents.

8. The statement of the accused was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence claiming himself to be innocent. In buttress of his case, the accused has filed certain documents marked as Ext-A to Ext-C.



9. After hearing the parties and perusing the record, the learned trial court passed the impugned judgment and order of conviction and sentence as detailed in the earlier paragraph.

10. Being aggrieved and dissatisfied with the aforesaid judgment and order of conviction and sentence, the convict has preferred the present Criminal Appeal.

11. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charges levelled against the appellant beyond all reasonable doubts or not.

12. It is submitted by the learned counsel for the appellant that no incriminating article has been recovered from conscious physical possession of the appellant. Though, the appellant was apprehended on 19.04.2014, but he was not put on TIP. The accused Manoj Kumar Mahto from whose possession the stolen article was recovered and who was identified by the accused has been acquitted by this Court. It is further submitted that though prosecution witnesses have supported the occurrence, but they have not identified the appellant during the course of occurrence. As as per account of PW-3 (Meera Devi) who happens to be wife of the informant, the dacoits had covered their face during the course of occurrence, so they could not have been identified and as per account of daughters of the informant examined in the case as PW-1 (Ansu Kumari) and PW-2 (Sweta) who were present at the place of occurrence at the time of



occurrence they had not identified the appellant during the occurrence while there is contradictions between the statement of PW-3 (Meera Devi) wife of the informant and the informant (PW-4). As as per account of PW-3, the appellant had pointed revolver on her chest at the time of occurrence while as per account of PW-4, the appellant had pointed revolver on his chest and took the key of *almirah* from him. Moreover, attention of the informant has been drawn towards contradiction in his statement given before the court and that given before the I.O. regarding identification of the appellant during the occurrence. But, the I.O. has not been examined by the prosecution, hence great prejudice has been caused to the appellant. Thus, the prosecution has utterly and miserably failed to substantiate the identification of the appellant during the course of occurrence and complicity of the appellant in the occurrence, hence, the appellant is entitled to be acquitted from the charges levelled against him.

13. On the other hand, learned APP advocating the correctness and validity of the impugned judgment and order of conviction and sentence, submitted that four materials witnesses examined by the prosecution including the informant have substantiated the prosecution case in toto and after correctly appreciating the facts and evidence on record, the learned lower court has rightly passed the impugned judgment and order of conviction and sentence, which is liable to be upheld and this



appeal has no substance in it and is liable to be dismissed.

14. From perusal of record, it appears that there are four materials witnesses of the case namely, PW-1 (Ansu Kumari), PW-2 (Sweta), PW-3 (Meera Devi) and PW-4 (Pawan Kumar). From perusal of testimony of the aforesaid witnesses, it appears that the aforesaid witnesses have unanimously stated that at the time of occurrence, they were watching television in their house. Their Munsif Ram Briksh Sah had gone to fetch pan para for the informant leaving the gate opened, in the meantime, 5-7 miscreants intruded into their *gaddi* and assaulted mother and father of P.W.4. On hulla made by his mother, he rushed to his *gaddi*, then one of the miscreants pointed revolver on his chest and demanded key. On divulging that the key is not with him, they entered into the room of informant and took key from his wife and plundered ornaments etc. and cash from the cash box of the *gaddi* and then decamped with the booty. The aforesaid statements of the witnesses happen to be in consonance with the case of the prosecution as adumbrated in the fardbeyan and the aforesaid witnesses have unanimously supported the prosecution case of committing dacoity in the house of the informant by some miscreants. But, from perusal of testimony of the PW-3 (Meera Devi) it appears that in paragraph 6 of her cross-examination, she has avoided to divulge the factum of giving deposition in earlier session trial about not identifying any of the accused during the



occurrence. In paragraph 10 of her cross-examination, she has denied to have given statement in earlier Session Trial that all dacoits had covered their face. To substantiate and negate the aforesaid statement given by her in earlier session trial, the defence has filed certified copy of her deposition recorded in Session Trial no. 316 of 1998 marked as Ext-B/5. From perusal of aforesaid deposition, it appears that in paragraph 4 of her deposition, she has candidly denied to have identified any of the accused during the occurrence while in paragraph 2 of her deposition, she has stated that all the accused persons had covered their face. Moreover, in paragraph 6 of her examination-in-chief recorded in the case under hand, she has stated that she had identified the appellant pointing revolver on her chest. But, in quite contradiction to the aforesaid statement of the PW-3 (Meera Devi), PW-4 (Pawan Kumar Bajoria) has stated in paragraph 8 of his examination-in-chief that the appellant had pointed revolver on his chest and demanded key and extended threatening of dire consequences. As as per the aforesaid statement of PW-3, the dacoits had covered their face at the time of occurrence, so there was no occasion to identify any of the accused persons including the appellant in the occurrence by the said witness. Moreover, from perusal of fardbeyan, it appears that the informant has not claimed to have identified the accused during the course of occurrence. He has also not divulged about any source of identification in the fardbeyan. From perusal of the



evidence of the witnesses, it appears that neither informant nor any witness has stated about any source of identification enabling them to identify the appellant in the occurrence as it was night at the time of occurrence. Hence, the aforesaid contradictory statement of PW-3 and PW-4 and aforesaid aspects of the case create serious doubt about identification of the appellant in the occurrence.

15. Moreover, from perusal of the statement of PW-1, who happens to be one of the daughters of the informant and was allegedly present at the place of occurrence, at the time of occurrence, it appears that he has failed to identify the appellant in the dock claiming in paragraph 4 of her examination-in-chief that she is suffering from eye ailment and due to which she could not see. Likewise PW-2 who also happens to be one of the daughters of the informant and was present at the time of occurrence, at the place of occurrence, has also failed to identify the appellant in the dock claiming elapsing of long span of time since the occurrence.

16. From perusal of paragraph 17 of the cross-examination of informant (PW-4), it appears that the attention of the said witness has been drawn by the defence regarding contradiction in his statement given in the court and that given before the I.O. regarding disclosure of the factum of identification of the accused in the occurrence to the I.O. I.O. has not been examined by the prosecution. Hence, I perused the case diary and on perusal of case diary, it appears that the informant had not



divulged the factum of identification of the accused persons to the I.O. in his statement recorded under Section 161 of the Cr.P.C. rather has simply furnished the list of looted articles to the I.O. reiterating his statement recorded in the fardbeyan. Though, the said statement of the informant has not been mentioned in the case diary by the I.O.

17. When the I.O. of the case is not examined by the prosecution and the attention of the witnesses has already been drawn towards their earlier statements and the Investigating Officer could not be brought to give his evidence, then in my considered opinion, the Court can peruse the case diary and find out as to whether or not the attention of the witnesses towards their previous statements were correctly drawn and to satisfy itself as to whether or not they had given similar statement before police. There are two parts of the case diary. First part contains such portion of the diary in which the Police Officer has recorded statement of the witnesses, about the incident or about other relevant facts which to that Police Officer, would be hearsay. The second part of the case diary contains that portion in which the Police Officer has himself seen or heard a particular fact and has recorded a fact out of his own perception. To this category would come recording about the inspection of place of occurrence making of seizure of certain incriminating articles or in some cases, when the Police Officer reaches the place of occurrence where the occurrence has not



finished and he sees himself whole or part of the occurrence, recording of that. The latter part of the case diary cannot be used by the Court unless the Investigating Officer is examined because that would amount to using that portion of the case diary as evidence. Only the Investigating Officer can tell the Court in witness box as to what were his findings out of his own perception, so that he can be put to cross-examination over that. However, the first part of the case diary consists, as already noted, the statement recorded by the witnesses. If the Investigating Officer comes to the Court for evidence and if he is asked to confirm those portion of the statement of the witnesses to which the attention of the witnesses was drawn, the Investigating Officer will say only what he has recorded as his statement in the case diary and cannot go beyond that. Now, the question is, whether that portion of the case diary can be looked into by the Court & used in the trial to aid the Court in reaching at a correct decision when the Investigating Officer is not brought before the Court. Sub-section (2) of Section 172 of Cr.P.C. provides that the Court cannot only call for the case diary but may also use such diary to take aid in such trial. If the Court only has the power to look into the case diary & whatever it peruses to keep it only in mind and then to proceed to record the judgment keeping such impression only in mind that, in my opinion, cannot be the intention of the legislation. In my considered opinion, if the Court peruses any such things and uses it to its aid in trial, this must go in



black and white as part of the judgment. The only limitation is that the Court cannot use any portion of the case diary as evidence. In view of the aforesaid proposition of law and in view of the contradiction between the statements of P.Ws. 4 as recorded before the Court and that given before the I.O. under Section 161 Cr.P.C., the testimony of the said witness regarding identification of appellant in the occurrence given before the Court does not appear to be reliable as he appears to have taken altogether different stand in the court regarding the identification of the appellant in the occurrence.

18. In view of the aforesaid contradictions between the statement of PWs-3 and PW-4 regarding identification of the appellant during occurrence, non-identification of the appellant in the dock by the PWs-1 and 2, want of source of identification at the place of occurrence at the time of occurrence and account of PW-3 that accused persons had covered their face at the time of occurrence, not divulgence the factum of identification of the appellant in the fardbeyan, I find and hold that the prosecution has utterly failed to substantiate the complicity of the appellant in the occurrence.

19. In the aforesaid facts and circumstances of the case, I find and hold that the prosecution has utterly and miserably failed to bring home the charge levelled against the appellant beyond all reasonable doubts by adducing convincing, cogent,



consistent and wroth credence ocular and documentary evidence. Hence, the impugned judgment and order of conviction and sentence passed by learned lower court is set aside and the appellant is acquitted of the charge levelled against him. As the appellant is in custody, he is directed to be released forthwith, if not wanted in any other case. Accordingly, the criminal appeal is allowed.

(Prakash Chandra Jaiswal, J)

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