

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.106 of 2002

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1. Bandhu Mahto son of late Bhukhan Mahto,
 2. Tulsi Mahto son of Bandhu Mahto,
 3. Deo Nandan Dusadh son of late Bharat Dusadh,
 4. Maharaj Mahto son of late Surmali Mahto,
 5. Krishna Mahto son of Soni Mahto and
 6. Mukhdeo Mahto son of late Surmali Mahto, 1 to 4 are residents of Village-Deokali, PS-Guraru, Distt-Gaya and appellants no. 5 and 6 are the residents of Village, Lahangia, PS-Kasama, Distt-Aurangabad.
- Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Madanjeet Kumar, Advocate
Mr. Rajeev Ranjan, Advocate
For the Respondent/s : Mr. Binod Bihari Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 16-01-2017

Appellants, Bandhu Mahto, Tulsi Mahto, Deo Nandan Dusadh, Maharaj Mahto, Krishna Mahto and Mukhdeo Mahto have been found guilty for an offence punishable under Section 395 IPC and each one has been directed to undergo RI for seven years vide judgment of conviction and sentence dated 21.02.2002 passed by learned 6th Additional Sessions Judge, Gaya in Sessions Trial No. 309/99/392/92.

2. Initially, on the *Fard-e-beyan* of PW 4, Sri Yadav Guraru PS Case No. 43/88 was drawn up wherein, after concluding investigation, final form was submitted. However, during midst thereof, protest petition was filed and so, after accepting the final form protest petition was treated as Complaint petition bearing Complaint Case No. 1198/88 whereupon informant/complainant was examined



on SA followed with examination of other witnesses and vide order dated 31.05.1991, appellants including Gopi Paswan (since deceased) were summoned to face trial for an offence punishable under Section 395 IPC.

3. The prosecution case as is evident from protest-cum-complaint petition is that in the night of 11.10.1988 at about 11:30 PM accused, Bandhu Mahto, Tulsi Mahto, Krishna Mahto, Gopi Paswan (since deceased), Deo Nandan Dusadh, Mukhdeo Mahto, Maharaj Mahto out of whom, Bandhu, Tulsi, Krishna, Deo Nandan happen to be his co-villager while Mukhdeo and Maharaj are of village, Lahangia, so armed raided his house and directed the complainant to come out whereupon complainant came out. Then thereafter, dacoits tied hands of complainant with Gamchha. Out of those dacoits, two dacoits were keeping watch over complainant while others forcibly tried to enter inside his house and during course thereof, his son, Amrika Yadav (PW 1) who was sleeping at his roof, brick-batted which caused annoyance to the dacoits and further, to terrorize, they fired. Then thereafter, the dacoits had gone inside the house and looted away all the articles. During course of dacoity, the dacoits were speaking *“Hum police hain, hum MCC hain, Saathi Theek guard kar raha hai, Bazar garam hai, Jo Saamne ayega, goli se uda denge, Teen murder ho gaya hai.”*

4. It has further been disclosed that dacoits had also assaulted him with Lathi. They were in between 25-50 years old.



Some were *Saanvla* and some were fair in complexion. Dacoits had also committed dacoity in the house of Kesar Yadav.

5. The defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 Cr.P.C. is that of complete denial of the occurrence as well as of false implication in the background of the land dispute prevailing amongst the parties.

6. During course of trial, prosecution had examined altogether four PWs out of whom PW-1, Amrika Yadav, PW-2 is Kauleshwar Paswan, PW-3 is Deoki Yadav and PW-4 is Sri Yadav. There happens to be no exhibit at the end of prosecution. In likewise manner, defence also not examined any of the DW nor exhibited any document on their behalf.

7. In the background of the fact that majority of the accused persons happen to be co-villager while two persons, i.e, Maharaj Mahto and Mukhdeo Mahto being outsiders coupled with the fact that initial version of the prosecution was disbelieved, first of all, evidence of PW-4, complaint is to be seen.

8. In examination-in-chief, he had stated that on the alleged date and time of the occurrence, the dacoits came, out of them, two came near his Darwaza and stood up there. He flashed torch and inquired from them who said that they were police. They also directed to come towards them. As soon as he came out, they caught hold of him and tied his hands. He objected. They inquired with regard to his



son over which he said that he was not present there though his son was over the roof. His son, Amrika Yadav flashed torch from the roof whereunder he saw the dacoits and identified them (named). His son had disclosed that the dacoits had come and he began to brick-bat from his roof. Seeing this, Bandhu Mahto threatened to kill and then fired. His son fled away. Then had disclosed that Tulsi, Maharaj, Mukhdeo also fired. Then thereafter, dacoits went inside his house and looted away his belongings including clothes, ornaments and cash. He raised alarm over which Kauleshwar, Deoki and others came. Then he identified the accused. He further stated that he had gone to police. Gave his *Fard-e-beyan* but police did not take any action whereupon he filed protest petition.

9. During cross-examination at para-10, he had stated that all the accused persons are his co-villagers save and except two who are residents of village, Lahangia which lies at the distance of six miles. However, they are relative of Bandhu Mahto and on account thereof, they are known to him. In para-11 as well as 12, he had further stated that there happens to be no dispute in between him and Bandhu Mahto. In para-13, he had stated that first of all he had given his *Fard-e-beyan* but police had not recorded the same. Police had not inquired from Amrika Yadav (his son) as well as others. He had further stated that police had not taken his LTI. In para-14, he had denied the suggestion that *Fard-e-beyan* was recorded by the police from him. In para-22, he had further stated that he had got no torch at



the relevant time. No lantern was burning at that very time. Dacoits had concealed their face by *Galmochha*. None of the villagers came at his house during course of occurrence. In para-23, he had given some sort of material which inspires confidence regarding their activity in the background of cutting of branches of a mango tree lying by the side of field of Bandhu Mahto.

10. So from his evidence, it is evident that in his examination-in-chief, he had shown presence of torch but during cross-examination, he had denied the same. He had further stated that the dacoits have concealed their face by *Galmochha* and as, he had not claimed identification by gait, appearance, utterances, though the dacoits were his co-villager, in the aforesaid background the reliability of his evidence over identification became suspicious one. Furthermore, in complaint petition, he had narrated that dacoity was also committed in the house of Kesar Yadav but during course of the examination-in-chief, he had not stated like so. Apart from the fact that aforesaid Kesar Yadav, who happens to be his full brother has not been examined nor any sort of explanation is found on that score.

11. PW-2 is Kauleshwar Paswan, who had stated that dacoity was committed in the house of his co-villager, Sri Yadav, during course of which there was firing. After more than 45 minutes, he came out from his house. He had not seen anybody. He rushed to the house of Sri Yadav where he came to know that dacoity was committed in the house of Kesar Yadav as well as Sri Yadav. He had



further stated that Kesar Yadav had disclosed that he had identified Deonandan, Bandhu, and Tulsi Yadav. His status has not been affirmed by PW-4 and on account thereof, he could not be accepted as a hearsay witness. Apart from this, he had not shown presence of PW-1, Amrika Yadav and PW-3, Deoki Yadav at the spot when he arrived.

12. PW-3 is Deoki Yadav, who had stated that on the alleged date and time of occurrence there was dacoity in the house of Sri Yadav whereunder dacoits succeeded in taking away articles worth of Rs. 10,000/-. He had further stated that at that very time, he slept at his *Baithka*. After hearing alarm raised by Sri Yadav, he had gone there. He had further stated that dacoit had tied his hands. Dacoits were armed with pistol, *Lathi* and *Fasuli*. He had seen dacoits in the torch light which he was possessing. He had further stated that he had seen torch in the hand of Amrika Yadav. He identified Mukhdeo Mahto, Maharaj Mahto, Tulsi Mahto, Bandhu Mahto, Krishna Mahto and Deonandan Dusadh amongst dacoits. After commission of dacoity in the house of Sri Yadav, dacoits had gone to the house of Kesar Yadav where they also committed dacoity. He identified accused in the dock. In para-5, he had stated that Buleshwar Paswan had earlier drawn up a case against Deonandan Dusadh as well as Gopi Paswan. They had been acquitted in the aforesaid case. He had further admitted that at the time of evidence Amrika Yadav, his nephew was present in the court. Sri Yadav, complainant happens



to be his cousin brother. Kesar Yadav also happens to be his brother. In para-8, he had stated that he heard sound of noise coming from *Baithka* of Sri Yadav. It was a dark night. Lantern, bulb, were not burning. He was possessing a torch which was not handed over to the police. In para-10, he had stated that the dacoits had concealed their faces by *Galmochha*. Then had stated that he out of fear had gone to his house. So from his evidence, it is crystal clear that he arrived at the place of PW-4, Sri Yadav on an alarm raised by him during course of commission of dacoity and further presence of dacoits having their face concealed would really give him an opportunity to identify the accused, the appellants when he had not claimed like PW-4 to have identified them through others means. Furthermore, it is also evident from his evidence that he had not supported the evidence of PW-4 on the score of firing having been made by the accused and further happens to be inconsistent with PW-4, the informant as, he had claimed presence of Amrika Yadav at the time of his arrival having torch while PW-4 had stated that after firing Amrika Yadav escaped therefrom. He happens to be also inconsistent with PW-4, as PW-4 had not spoken with regard to alarm having raised by him. So, his presence at the place of occurrence during course of commission became doubtful.

13. PW-1 is Amrika Yadav, son of PW-4, the complainant. He had deposed that on the alleged date and time of occurrence dacoits came to his house. At that very time, he was sleeping in a



room located at upper floor. After hearing his father's alarm, he awoke and then, flashed torch and then saw 25 dacoits present out of whom he had identified, Bandhu Mahto, Tulsi Mahto, Deo Nandan Dusadh, Maharaj Mahto, Krishna Mahto, and Mukhdeo Mahto. He began to brick-bat from the roof over which the accused persons fired 5-6 rounds. Then thereafter, the accused persons entered inside his house and looted away all the articles, cash, documents and ornaments. During course thereof, Maharaj and Mukhdeo were armed with pistol. Others were armed with Fasuli and Lathi. Kauleshwar Paswan, Deoki Yadav, Kesar Yadav, Ayodhya Pd. Balgovind Yadav and Ravidas had seen the dacoits. Dacoits had also committed dacoity in the house of Kesar Yadav. At the time of dacoity, dacoits were saying, “ *Hum police hain, hum MCC hain, Bazar garam hai, Maal Mil Raha Hai, Teen murder ho gaya hai, Jo Saamne ayega, goli se uda denge*”.

14. On the following day, his father had gone to the police and informed but as the police became ineffective, a protest petition was filed.

15. During course of cross-examination, his conduct has been exposed relating to police case. Then at para-20, he had stated that he had found 25 dacoits in the torch light. In para-21, there happens to be contradiction with regard to his previous statement given at the time of enquiry. In para-23, he had further stated that Kauleshwar had instituted a case against some of the accused but



neither he nor his father was witness in the said case.

16. In para 26, he had further stated that there was no dispute amongst the parties before commission of the occurrence rather a dispute arose after the occurrence and for that, he is ready to support the same by the documentary evidence (however, never filed). From para-27, it is evident that houses of Soni Yadav and Badri Yadav lie in the boundary of his house but they are not witnesses of the occurrence. In para-28, he had further stated that the faces of the dacoits were duly exposed. In para-30, he had stated that after 15 minutes of the alarm having been raised by his father, he awoke. His father had sustained assault by *Lathi*. In para-32, he had stated that 20 minutes after fleeing of dacoits, villagers came.

17. So, from his evidence, it is evident that he happens to be inconsistent with the evidence of PW-3 and 4 who had stated that at the time of occurrence, dacoits had concealed their faces by *Galmochha* while this witness had stated that their faces were duly exposed. This inconsistency appears to be important one in the background of the fact that the same happens to be source of the identification. Furthermore, the aforesaid infirmity is to be perceived in the background of the fact that there happens to be some sort of enmity amongst the parties prevailing since before. Apart from this, non examination of Kesar Yadav in whose house, as per prosecution itself, dacoity was also committed and further, being own brother of PW-4, Sri Yadav appears to be prejudicial to the interest of the



prosecution.

18. Cumulative effect of the aforesaid deficiencies, infirmities persisting in the prosecution case, dethrones reliability of the prosecution version and on account thereof, it looks unsafe to accede to the finding rendered by the learned lower court. Consequent thereupon, the same is set aside. Appeal is allowed.

19. Since all the appellants are on bail, they are discharged from the liability of the bail bond.

(Aditya Kumar Trivedi, J)

Patna High Court
January 16th 2017
Perwez/AFR

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