

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.216 of 2015**

Arising Out of PS.Case No. -256 Year- 11 Thana -KHARAGPUR District- MUNGER

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Tinku Kumar @ Ashish Kumar, S/o Suvansh Mahto, R/o Village - Belthu, P.S. - Sahkund, District - Bhagalpur.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Sanjay Kumar Jha-Advocate
Mr. Kumar Kamal Nayan-Advocate

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

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 13-10-2017

Appellant, Tinku Kumar @ Ashish Kumar has been found guilty for an offence punishable under Section 395 of the I.P.C. and sentenced to undergo R.I. for 10 years as well as to pay fine appertaining to Rs.5,000/-, in default thereof, to undergo R.I. for three months, additionally by the Adhoc Additional Sessions Judge-8th, Munger vide judgment of conviction dated 20.03.2015 and order of sentence dated 23.03.2015 passed in connection with Sessions Trial No.567 of 2012/ 212 of 2012.

2. Unknown miscreants, on the pretext of firearm, intruded inside the Bihar Chhetriya Gramin Bank Branch, Dhaprimor and succeeded in decamping with Rs.4,76,312/- from the bank strong room while Rs.15,000/-, which was kept at counter by one of the



customers Jawahar Manjhi as well as that of Kalpana Singh and for that, on the fard-bayan of Manager, Rajesh Kumar Gupta (PW-3), Haweli Kharagpur P. S. Case No.256 of 2011 has been registered against unknown. During course of investigation, so many persons including the appellant were apprehended. It has been alleged that appellant had made inculpatory extra-judicial confessional statement and on his pointing, cash appertaining to Rs.45,000/- as well as a photo stat machine, which was concealed, purchased from the booty were recovered and seized. It is further evident that appellant as well as one Pankaj Kumar Bind (trial separated due to absence) were identified during course of T. I. Parade. After completing investigation, chargesheet was submitted paving way for trial which ultimately concluded adverse to the appellant on account of which, has been challenged under present appeal.

3. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. It has further been pleaded that seized cash appertaining to Rs.45,000/- belongs to the appellant and in likewise manner, photo stat machine. To substantiate the same, examined one DW Sanjay Kumar Mahto as DW-1, who stood earlier as one of the seizure list witness.

4. In order to substantiate its case, prosecution had



examined altogether 12 PWs, who are PW-1 Jawahar Manjhi, PW-2 Santosh Kumar Singh, PW-3 Rajesh Kumar Gupta, PW-4 Kalpana Singh, PW-5 Manoj Kumar Singh, PW-6 Sri Raja Ram Santosh Kumar, PW-7 Sri Shukul Ram, PW-8 Vishwanath Yadav, PW-9 Santosh Kumar Yadav, PW-10 Vishwabandhu, PW-11 Anil Kumar and PW-12 Rakesh Ranjan as well as had also exhibited viz. Fard-bayan Exhibit-1, endorsement over fard-bayan Exhibit-1/1, signature of S.I. Exhibit-1/2, Exhibit-2 series, happens to be the T. I. Chart, formal F.I.R. Exhibit-3, seizure list Exhibit-4 series, inculpatory extra-judicial confessional statement of appellant Exhibit-5. Prosecution had also exhibited the material exhibit viz. Mobile Exhibit-I, II, Exhibit-III Rs.45,000/-, Exhibit-IV photo stat machine. As disclosed hereinabove, defence had simply examined one DW Sanjay Kumar Mahto as DW-1.

5. While assailing the judgment of conviction and sentence, it has been submitted at the end of learned counsel for the appellant that the finding recorded by the learned lower Court is perverse, cryptic and on account thereof, is unsustainable in the eye of law. In order to substantiate such plea, it has been submitted that learned lower Court ought not to have convicted the appellant under Section 395 of the I.P.C. in the background of the fact that apart from having instant case registered against unknown, during course of



investigation, it is said that appellant was identified by one Sanjay Kumar Yadav, who during course of trial has been examined as PW-9, who during course of evidence, had deposed that he was knowing the appellant since before the occurrence and so, the proprietary of T. I. Parade vanished. In likewise manner, it has also been submitted that PW-9 had further disclosed that when he reached at the P. S., he found the appellant sitting there. Furthermore, he had also stated that he had not identified the appellant as a dacoit rather he identified the appellant as he was known to him since before. Accordingly, the sanctity of T. I. Parade lost. Save and except PW-9, none other had claimed identification and so, virtually, no legal evidence subsists against him justifying the finding recorded by the learned lower Court.

6. Furthermore, it has also been submitted that appellant has not been sentenced for an offence punishable under Section 412 of the I.P.C. as in the opinion of the learned lower Court conviction having been recorded under Section 395 of the I.P.C. will serve the purpose and that being so, this Court while adjudicating upon instant appeal would not encroach upon interest of the appellant relating to Section 412 of the I.P.C. in the background of restriction having prescribed under Section 386 of the Cr.P.C. whereunder the power of the Appellate Court has been identified.



7. However, on Court's query that though sentence has not been recorded against the appellant and for that, an explanation has been given by the learned lower Court itself at the fag end of the judgment, though appellant has been identified to be guilty under Section 412 of the I.P.C. also, the learned counsel for the appellant mechanically argued that the finding relating thereto by the learned lower Court also happens to be wrong. To substantiate such plea, it has been submitted that no seizure list witness has been examined, contrary to it, one of the seizure list witness has been examined on behalf of defence, who contradicted the prosecution story with regard to recovery of Rs.45,000/- as well as photo stat machine. Furthermore, it has also been submitted that recovered articles were not put on T. I. Parade nor there happens to be description of the looted money. Had there been, then in that circumstance, there would have been possibility of matching of serial number of currency notes, which could have direct impact upon fate of the instant case as the currency notes are supposed to be in possession of each and every citizen and for that, no limitation is prescribed. Therefore, recovery of Rs.45,000/- from the possession of the appellant, even accepting the prosecution case, would not justify the finding. Moreover, by way of DW-1, appellant has tried to explain that aforesaid amount was taken away by the police, which they



procured after coercing father of the appellant as well as also took signature of DW-1 over blank paper, which was later on converted as search-cum-seizure list and so, having failed to inter-link the recovered amount to be the booty, appellant would not be convicted and sentenced under Section 412 of the I.P.C. So, submitted that it is a fit case wherein the finding recorded by the learned lower Court should be brushed aside.

8. On the other hand, learned Additional Public Prosecutor while opposing the submission made on behalf of appellant has submitted that no suggestion has been given at the end of the appellant to the police officials that they were hostile and on account thereof, false seizure list has been prepared to malign prestige of the appellant. Apart from this, it has also been submitted that what was necessity for the police official to direct the father of the appellant to pay Rs.45,000/- which, according to defence was shown to be the part of the booty and that also happens to be with regard to photo stat machine. From Para-6 of PW-10, it is apparent that during course of purchase, appellant had tried to conceal his identity and it happens to be another circumstance which suggests that the aforesaid photo stat machine was purchased out of the part of the booty amount. Apart from this, it has also been submitted that from the evidence of DW-1, activity of the appellant is found itself exposed. So, submitted that it is



a fit case wherein appellant at least liable to be convicted under Section 412 of the I.P.C.

9. It is needless to say that in terms of Section 101 of the Evidence Act, the obligation lies upon the prosecution to substantiate its case beyond all reasonable doubt. When the prosecution succeeds, then in that circumstance, onus lies upon the accused to explain the same. Now, coming to facts of the case, it is evident that it could be bifurcated in two parts, the first part relating to proper identification as one of the member of dacoits, who committed dacoity at the Dhaprimor Bihar Kshetriya Gramin Bank and the second event happens to be with regard to recovery of the booty.

10. So far identification as one of the dacoits is concerned, from the record, it is evident that save and except PW-9, none other witnesses right from PW-1 to PW-5 had claimed identification. PW-6 and PW-7 are the Judicial Magistrates, who have had conducted the T. I. Parade and sofar appellant is concerned, evidence of PW-6 is relevant. The learned counsel for the appellant is justified in his submission that PW-9 had frustrated the proprietary of T. I. Parade as he had claimed the appellant to be known since before. More particularly in Para-5 of his cross-examination, he had stated that he had not identified Tinku Kumar as a member of the dacoits rather he identified him on account of knowing him since before. So,



certainly the aforesaid part of evidence having been deposited at the end of PW-9 ruined the fact of the prosecution case, which even after examination of PW-10 as well as PW-6 would not be found duly barricaded as, after all, the evidence of PW-9 happens to be the substantive evidence, which in the facts and circumstances stated above, is found completely gutted down.

11. So far Section 412 of the I.P.C. is concerned, after going through the evidence of respective witnesses, more particularly PW-10, the I.O. in consonance with the evidence of DW-1, Sanjay Kumar Mahto, one of the seizure list witnesses, it is evident that there happens to be no controversy with regard to relevancy of Rs.45,000/-, though for the same, an alternative story has been propounded by the appellant, but is not at all found convincing in the facts and circumstances of the case as neither there happens to be suggestion to the PW-10 on that very score, nor DW-1 had said anything. More particularly, the appellant himself, during course of his statement under Section 313 of the Cr.P.C., failed to explain. So far status of photo stat machine is concerned, prosecution has not substantiated, save and except inculpatory extra-judicial confessional statement of the appellant, Exhibit-5 that aforesaid photo stat machine was purchased out of booty. Now, coming to acceptability of evidence concerning recovery of Rs.45,000/-, for want of having it put on T. I.



Parade, for want of having proper disclosure at the end of the prosecution relating to serial number of the currency notes having looted away by the dacoits, having failure at the end of the PW-10 to record serial number of the seized currency notes and further, getting it tallied with the looted currency notes, could not link the appellant to be in possession of booty, more particularly in the background of the fact that having the alleged recovery made after five months would not allow to attract presumption in terms of Section 114 of the Evidence Act. So, it was incumbent upon the prosecution to substantiate the recovered amount to be booty and having the same on record conclusively would have found additional support by way of inculpatory extra-judicial confessional statement of appellant. As prosecution failed, hence, even accepting presence of inculpatory extra-judicial confessional statement would not give life to the prosecution.

12. That being so, the judgment of conviction and sentence recorded by the learned lower Court is set aside. Appeal is allowed. Appellant is on bail, hence is discharged from its liabilities.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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