

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.489 of 2003

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1. Deo Narayan Yadav @ Dewan Yadav, Son of Late Thakur Prasad Yadav,
Resident of Village – Bishanpur, P.S. – Supaul, District – Saharsa.
 2. Kaila Mian @ Kailu Mian, Son of Late Khudabaks Mian, Resident of Village –
Bhawanipur, P.S. – Singheswar, District – Madhepura.
 3. Jagdish Gareri, Son of Late Prithvi Gareri, Resident of Village – Itahari, P.S –
Supaul, District – Saharsa.
 4. Raj Kishore Yadav
 5. Kiro Yadav
Both Sons of Bhumi Yadav, Residents of Village – Barahi, P.S. and District –
Madhepura.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Krishna Pd. Singh, Sr. Adv.
Mr. Jharkhandi Upadhyay, Adv.
Mrs. Meena Singh, Adv.

For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 08-03-2018

This appeal is directed against judgment of conviction and order of sentence dated 18.09.2003, passed by Sri A.K.M.M Qureshi, the then 3rd Additional Sessions Judge, Saharsa, in Sessions Trial No. 40, 41/85, by which the appellants were convicted under Section 395 of the Indian Penal Code (in short the “IPC”) and were sentenced to undergo R.I. for 05 years.

2. Prosecution case as per the fardbeyan of Moti Pd. Singh (since died) in short is that on 20.4.84, while the informant was sitting on his *darwaza* at 7.00 P.M., the dacoits armed with pipe gun entered inside



his house and asked as to where he has kept the gun, when he refused, they entered inside the rooms and looted away the gun along with gold ornaments and other articles. On the basis of the said fardbeyan of informant, Supaul P.S. Case No. 66/84 was registered.

3. It appears that appellant Deo Narayan Yadav and Jagdish Gareri has been named in the F.I.R., whereas appellant Kaila Mian was identified by P.W. 1 Sanjeev Kumar and P.W. 2 Bijay Kumar Singh and appellant Raj Kishore Yadav has been identified by P.W. 2 Bijay Kumar Singh during the course of investigation.

4. Police after investigation submitted charge-sheet. Cognizance of the offence was taken and the case was committed to the court of sessions, which ultimately came to the file of Sri A.K.M.M Qureshi, the then 3rd Additional Sessions Judge, Saharsa, for Trial and disposal.

5. It further appears from perusal of record that after commitment session trial was numbered as S.C. No. 40/85. Thereafter on supplementary case record with respect to accused Jagdish Gareri and Ganesh Yadav was received in the court from Sub Divisional Judicial Magistrate along with chargesheet and earlier charges were framed against five accused persons and on 29.07.86 accused – appellant Kaila Mian has separately been charged for offence under Section 412 of the IPC but the record shows that on 09.08.87, the trial court heard



on the point of charge with respect to accused Jagdish Gareri and Ganesh Yadav and the trial court found the *prima facie* case available, framed charge under Section 395 and did not find the case for charge against accused Ganesh Yadav under Section 395 of the IPC and, thereafter, joint trial of both the case i.e. Sessions Trial No. 40/85 and 41/85 initiated in which six accused persons faced trial.

6. In order to prove its case, prosecution has examined altogether seven witnesses, they are; P.W. 1 - Sanjeev Kumar Singh, P.W. 2 – Bijay Kumar Singh as well as Baneshwar Yadav, who was examined after joint trial, P.W. 4 – Rita Devi @ Koki, declared hostile by the prosecution, P.W. 5 – Jyoti Devi tendered for cross examination, P.W. 6 – Dhruv Shankar Upadhyaya District Sub-Registrar, who conducted the T.I.P. and identified the material seized and P.W. 7 – Amrendra Prasad Singh, who has identified the article in T.I.P. It appears that in this case neither informant nor I.O. has been examined in this case.

7. Apart from that following documents have been brought on record and marked as: Ext. 1 – Seizure list, Ext. 1/1 – Signature of informant on fardbeyan, Ext. 2 – T.I.P chart of the articles recovered and Ext. 3 – T.I.P chart of the accused.

8. On behalf of the defence also, one witness, namely, Anant Prasad Singh has been examined as D.W. 1 in order to show that



Kaila Mian was at inimical term with the informant and his sons.

9. Learned Trial Court after considering the evidence available on record convicted the appellants under Section 395 of the IPC and sentenced them in the manner as stated above. Vide the said judgment accused, namely, Upendra Yadav was acquitted from the charge under Section 395 of the IPC and appellant Kaila Mian from the charge under Section 412 of the IPC.

10. Being aggrieved, the appellants preferred the present appeal.

11. Contention of learned senior counsel Shri Krishna Prasad Singh, is that so far appellant Deo Narayan Yadav and Jagdish Gareri are concerned, except the allegation that they have been named in the F.I.R., there is absolutely nothing against them and they have also not been identified in T.I.P. and in this case neither informant nor I.O. has been examined and even the fardbeyan and formal F.I.R has not been legally brought in evidence and, therefore, the fardbeyan is not admissible in the facts and circumstances of the case. It has further been submitted that it is alleged that though P.W. 4 Rita Devi has identified the appellant Jagdish Gareri but she has been declared hostile as she did not identify the appellant Jagdish Gareri in court and so far other witnesses are concerned, though they have named the appellant Deo Narayan Yadav and Jagdish Gereri but it appears that they have named them as per the hearsay of informant but since the



informant has not been examined and P.W. 4 Rita Devi has not stated so in Court, then the evidence of other witnesses identifying Deo Narayan Yadav and Jagdish Gareri are not admissible. Further contention of learned senior counsel is that so far other appellants are concerned, appellant Kiro Yadav has been identified by informant in T.I.P. but the informant has not been examined in this case, though T.I.P. chart has been brought on record as Ext. 3. However, T.I.P. chart is not substantive piece of evidence rather the evidence in court is substantive piece of evidence and as the informant has not been examined, as such identification of appellant Kiro Yadav is not admissible. Further submission of learned senior counsel is that so far appellant Kaila Mian and Raj Kishore Yadav are concerned, appellant Kaila Mian has been identified by P.W. 1 Sanjeev Kumar Singh and P.W. 2 Bijay Kumar Singh and so far appellant Raj Kishore Yadav is concerned, he has been identified by P.W. 2 Bijay Kumar Singh. However, the evidence of Bijay Kumar Singh in para -12 shows that he identified these appellants only on suspicion and he could not say properly that appellant Raj Kishore Yadav or any person was involved in the dacoity and as such evidence of this witness creates a suspicion with regard to identification of appellants Kaila Mian and Raj Kishore Yadav. P.W. 1 has also identified the appellant Kaila Mian, however, it has been submitted that this witness has not stated in his evidence



as to how he identified the appellant Kaila Mian and as to what he was doing at that time. Furthermore, this witness at the time of occurrence was aged about 08 years, which appears from para -7 of his cross-examination and as such identification of appellant by this witness is also not free from reasonable doubt. It has further been contended that so far identification of articles are concerned, P.W. 7, who is witness has himself stated that those articles are easily accessible available in market and, therefore, his identification with regard to recovered articles, is of no importance but the Trial Court without considering all these infirmities has convicted the appellants under Section 395 of the IPC, which is out and out perverse and not sustainable in the eye of law.

12. Learned counsel for the respondent – State, on the other hand, supported the finding of guilt recorded by the trial court and submitted that appellants Kailu Mian and Raj Kishore Yadav has been identified in T.I.P. held by P.W. 6 and further there is recovery from the house of Kailu Mian and those articles were also identified by P.W. 7 and furthermore, P.W. 1 and P.W. 2 has also identified appellant Kailu Mian and other two appellants are named in the F.I.R itself and, therefore, there is no infirmity in the impugned judgment of Trial Court and conviction of appellants under Section 395 of the IPC is just and proper.



13. Considered the rival contentions of the parties. From perusal of the evidence, it appears that so far factum of dacoity is concerned, all the witnesses including Rita Devi, who has been declared hostile by the prosecution, have supported the prosecution case. However, as pointed out by learned senior counsel appearing on behalf of appellants that appellant so far appellants Deo Narayan Yadav and Jagdish Gareri are concerned, except they have been named in the F.I.R, and their names disclosed to P.W. 1 and P.W. 2 by the informant – Moti Pd. Singh and Rita Devi, there is nothing against these appellants and in this case as stated earlier informant and I.O. has not been examined to prove and brought the fardbeyan on record and so far evidence of Rita Devi is concerned, her evidence shows that she did not identify these appellants in the court and she has stated that she had not identified any person and, thereafter, she was declared hostile by the prosecution. As such so far appellants Deo Narayan Yadav and Jagdish Gareri are concerned, there is absolutely nothing against them. So far appellant Kaila Mian is concerned, he was identified by P.W. 1 Sanjeev Kumar as well as by P.W. 2 Bijay Kumar in T.I.P. (Ext. 3) and T.I.P. chart has also been proved by P.W. 6 Sub-Registrar, who conducted the T.I.P. and further the appellant Kiro Yadav was identified by informant Moti Pd. Singh, however, he has not been examined in this case and no reason has been assigned



for his non examination, he might have died during pendency of case, however, the T.I.P. chart has been brought on record. It appears that appellant Raj Kishore Yadav has also been identified by P.W. 2 in T.I.P. but it is well settled that T.I.P. is not a substantive piece of evidence rather the evidence in court is substantive piece of evidence. However, in absence of examination of informant in court, who has identified the appellant Kiro Yadav, there is nothing available on record to prove his complicity in the alleged offence. So far other appellants are concerned, though appellants Raj Kishore Yadav and Kaila Mian had been identified by P.W. 2 Bijay Kumar Singh, however, this witness in para 12 has stated that he identified the appellants on suspicion only and he was not sure about their participation in the alleged offence and that demolishes the identification made by this witness in T.I.P. So far P.W. 1, is concerned, he has identified Kaila Mian in T.I.P. but his evidence is silent on the point that as to how he identified the appellant Kaila Mian and as to what he was doing at the time of dacoity and further there is no corroboration of his evidence. P.W. 2 is the son of informant and F.I.R itself shows that at time of occurrence, he was not present at the house and that also creates a reasonable doubt with regard to identification of appellants Kaila Mian. As per prosecution, recovery was made from the house of Kailu Mian and P.W. 7 is



witness in seizure list and he has stated in his evidence that the those articles are easily available in market and it cannot be said that those articles were looted articles. It further appears that Section 313 of the Cr.P.C has not been complied in this case as the appellants not been put the question with regard to their identification by the witnesses in the Test Identification Parade.

14. Considering the entire discussions made above, I find that the prosecution has failed to prove its charge against the appellants beyond all reasonable doubts and impugned judgment suffers from infirmities and inconsistencies.

15. Accordingly, this appeal is allowed. Judgment of conviction and order of sentence dated 18.09.2003, passed by Sri A.K.M.M Qureshi, the then 3rd Additional Sessions Judge, Saharsa, in Sessions Trial No. 40, 41/85, is set aside.

16. As the appellants are on bail, they are discharged from liability of bail bonds.

(Vinod Kumar Sinha, J)

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