

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.466 of 2003

Arising Out of PS.Case No. -null Year- null Thana -null District- NAWADA

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Bimal Kumar Singh @ Bimal Kumar, son of Late Ram Swaroop Singh, resident of
Sheikhpur Sarai, P.S. Shekhopur Sarai, District Sheikhpura

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant/s : Ms. Surya Nilambari, Advocate

For the Respondent/s : Mr. Binod Bihari Singh, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 30-03-2018

Sole appellant has been convicted under Section 395 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for seven years and he has been acquitted from the charge under Section 412, vide judgment and order dated 17.9.2003 passed by Sri Kamla Prasad Sinha, the then Presiding Officer, Additional Court of Sessions, Fast Track Court, Nawada in Sessions Trial No. 146 of 2003/30 of 94.

2. Prosecution case, in short, is that on 10.8.1993 at about 10 P.M. a dacoity was committed in the house of Madan Prasad (PW 8), which was the date of Janmastami. It is also the prosecution case that on that day his family members were preparing for “puja” and “Prasadi” and a lantern was burning in the house and in the meantime dacoits entered into the house from the northern opening of the house and they terrorized the females and children by firing in the courtyard



and pressing “Chhura” towards them. Further prosecution case is that informant Madan Prasad, who was on the verandah outside with his son Jitendra heard the cries and shouts of his family members and came inside the house and saw dacoits were there, who entered into his room on the south and removed three boxes therefrom. On alarm villagers started assembling and dacoits took to their heels towards north. It is also stated that the dacoits fired and scared away the villagers and dacoits took away cash, clothes, ornaments, etc. worth Rs.17,350/-.

3. On the basis of aforesaid fardbeyan, Nardiganj P.S. Case No.55 of 1993 was registered and record further shows that the appellant was not named in the FIR but later on police arrested him two days after the occurrence on 12.8.1993 and some articles were also allegedly recovered from his house and record further shows that TIP was held of the persons and articles and appellant was identified by five witnesses, i.e., PWs. 1, 4, 5, 7 and 8 and the articles were also identified in TIP.

4. Charge sheet has been submitted against the appellant and one FIR named accused Deolakhan Singh alias Bam Bam Singh. Cognizance of the offence has been taken and after commitment the case ultimately traveled to the file of learned Trial Judge for trial and disposal.

5. Charges were framed under Sections 395 and 412 IPC.



6. The learned trial court during trial has examined altogether 11 witnesses on behalf of prosecution in order to substantiate its case, they are PW 1 Dharmendra Kumar, son of informant, PW 2 Subodh Kumar, seizure list witness and declared hostile, PW 3 Binod Kumar, seizure list witness, declared hostile, PW 4 Nilam Kumari, daughter of informant, PW 5 Sangita Kumari, daughter of informant, PW 6 Jayendra Prasad, production list witness, PW 7 Jitendra Kumar, son of informant, PW 8 Madan Prasad, the informant, PW 9 Ganauri Raut, production list witness, PW 10 Ramdheyan Singh, one of the I.Os. of the case and PW 11 Jadunandan Singh, a formal witness.

7. Apart from that, on behalf of prosecution the following documents have been brought on record as exhibits, they are Ext.1- signature of Subodh Kumar on seizure list, Ext.1/1- signature of seizure list witness Binod Kumar, Ext.1/2- signature of Jayendra Prasad on production list, Ext.1/3- signature of Ganauri Raut on production list, Ext.1/4- signature of informant Madan Prasad on seizure list, Ext.1/5- signature of Ganauri Raut on fardbeyan, Ext.2- fardbeyan and Ext.3- formal FIR.

8. Apart from that, looted articles have been brought on record as Material Exhibits I to X/2.

9. Defence of the accused is of false implication and of innocence.

10. Learned trial court on conclusion of trial has convicted



the appellant under Section 395 IPC relying on the identification of the accused in court and sentenced him as stated above. However, he has acquitted the appellant from the charge under Section 412 IPC.

11. Contention of learned counsel for the appellant is that evidence of PWs. 1, 4, 5 7 and 8 shows that they have identified the appellant in court but it is also their evidence that accused was shown to them in Muradpur Police Station after his arrest on 12.8.1993 and, as such, identification of the accused in court is not free from suspicion and reasonable doubt. Further contention of learned counsel for the appellant is that accused was arrested on 12.8.1993 and TIP was held on 10.9.1993 after delay of almost one month and that also vitiates the identification of the accused in TIP. It is also submitted by learned counsel that in this case neither the Magistrate, who has conducted TIP, has been examined nor identification chart has been produced and had he been examined in this case the defence would have asked him about the role of appellant in course of dacoity and what weapon he was holding at that time and as to where he was standing there, as such, non-examination of Magistrate has caused serious prejudice to appellant and that makes the identification in court vulnerable, hence, identification of the accused in court has no value in the eye of law.

12. On the other hand, learned counsel for the State has submitted that the accused appellant has been identified by the five



witnesses, as such, conviction of the appellant under Section 395 IPC is just and proper and does not required any interference by this Court.

13. In the background of submission of both sides, on perusal of the evidence of the prosecution witnesses it appears that there is sufficient and cogent evidence on record with regard to factum of dacoity is concerned. Appellant is not named in FIR, later on he was arrested and said to be identified by five witnesses, i.e., PWs. 1, 4, 5, 7 & 8. However, so far identification of appellant by PWs. 1, 4, 5, 7 and 8 is concerned, it appears from perusal of evidence of PW 8 in paras 24 and 25 that Darogaji and DSP had apprehended the appellant Bimal Kumar Singh and handed over to Muradpur P.S. and Darogaji told him about arrest of accused appellant and recovery of looted articles from him and he was handed over to Muradpur P.S. and on that information PW 8 had gone to Police Station and saw Bimal Kumar in the Police Station. Similarly, evidence of PW 4 in para 12 also discloses that the appellant prior to TIP was shown to him saying that he was the person who was wearing lungi as Bimal Kumar. Evidence of PW 5 in paras 17 and 18 also discloses that Darogaji had called her and her family members in the police station and in the police station Chaukidar had seen them the apprehended accused as Bimal Kumar. As such, so far identification of appellant by PWs. 8, 4 and 5 is concerned, that does not appear to be free from reasonable doubt as their evidence shows that they have been shown the appellant



prior to TIP in the Police Station.

14. Further it appears from the evidence of PW 7 in para 16 that he has identified only one dacoit in TIP and pointing towards Bimal Kumar and he has stated that he has not identified him. That discloses that PW 7 has not identified him. So far identification by PW 1 is concerned, he has identified the appellant in court but learned counsel for the appellant has drawn my attention towards para 24 of his deposition wherein he has stated that he had gone to jail for TIP which has been conducted after one month of occurrence and identified accused in jail and para-24 discloses that his name is Bimal Kumar.

15. Further, it appears that though PWs. 1, 4, 5 and 8 have identified the appellant in court but their evidence did not disclose anything to show as to what role the accused appellant played in course of dacoity and what weapon he was in possession at that time and where he was standing.

16. Apart from that, in this case the Judicial Magistrate, who has conducted TIP has not been examined nor TIP chart has been brought on record, as such, no question would be asked from the appellant as to the procedure in conducting TIP in court and as to what role has been assigned to the defence while identifying the appellant and as to what was the weapon the appellant possessed at the time of dacoity and that certainly caused prejudice to the defence.



No doubt, TIP chart is not a substantive piece of evidence rather identification of the accused in court is substantive and admissible under Section 9 of the Evidence Act. However, in absence of production of TIP chart and non-examination of Magistrate cause prejudice to the defence and adverse inference has to be drawn against the prosecution for non-examination of Magistrate and non-production of TIP chart.

17. It further appears that appellant was arrested on 12.8.1993 and TIP was held on 10.9.1993, i.e., almost one month's delay in conducting TIP, which throws doubt on the genuineness thereof Hon'ble Apex Court in the case of **Md. Sajjad @ Raju @ Salim vs. The State of West Bengal : 2017(2) PLJR SC 19**, in paragraph 18 of the judgment the Hon'ble Apex Court has held as follows :

“18. In the instant case none of the witnesses had disclosed any features for identification which would lend some corroboration. The identification parade itself was held 25 days after the arrest. Their chance meeting was also in the night without there being any special occasion for them to notice the features of any of the accused which would then register in their minds so as to enable them to identify them on a future date. The chance meeting was also for few minutes. In the circumstances, in our considered view such identification simplicitor cannot form the basis or be taken as the fulcrum for the entire case of prosecution. The suspicion expressed by P.W.8 Swraswati Singh was also not enough to record the finding of guilt against the appellant. We, therefore, grant benefit of doubt to the appellant and hold that the prosecution has failed to establish its case against the appellant.”



18. In the present case also, no feature has been assigned for identification of the accused and evidence shows that accused has been identified from before TIP and there is delay in conducting TIP. All the above infirmities and inconsistencies have not been considered by learned trial court while convicting the appellant.

15. Considering the discussions made above, it appears that the prosecution case suffers from infirmities and inconsistencies and identification of appellant by four witnesses is not free from reasonable doubt, as such, the conviction and sentence do not appear to be sustainable in the eye of law.

16. Accordingly, this appeal is allowed. The impugned judgment and order are set aside. As the appellant is on bail, he is directed to be discharged from the liability of his bail bond.

(Vinod Kumar Sinha, J)

spa/-

AFR/NAFR	
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