

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.144 of 2003

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

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Anil Yadav, son of Dayanand Yadav, resident of village Chatar, P.S. Araria,
District Araria

.... Appellant

Versus

The State of Bihar

.... Respondent

with

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Criminal Appeal (SJ) No. 147 of 2003

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

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Ashok Yadav, son of Basu Yadav, resident of village Diyari, P.S. Araria, District
Araria

.... Appellant

Versus

The State of Bihar

.... Respondent

with

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Criminal Appeal (SJ) No. 175 of 2003

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

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Deva Nand Yadav, son of Munna Yadav, resident of village Diyari, P.S. Araria,
District Araria

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

(In CR. APP (SJ) No.144 & 147 of 2003)

For the Appellant/s : Mr. Shiv Shankar Azad

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

(In CR. APP (SJ) No.175 of 2003)

For the Appellant/s : Mr. Baban Roy, Advocate (amicus curiae)

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

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 19-01-2018

Heard Mr. Shiv Shankar Azad, learned counsel appearing on



behalf of appellant Anil Yadav in Cr.Appeal SJ) No.144 of 2003 and appellant Ashok Yadav in Cr.Appeal (SJ) No. 147 of 2003. As no body appears on behalf of appellant Deva Nand Yadav in Cr.Appeal (SJ) No. 175 of 2003, Mr. Baban Roy, Advocate has been appointed as amicus curiae to assist this Court.

2. As all the three appeals arise out of the same judgment, they have been heard together and are being disposed of by this common judgment.

3. All the appellants have been convicted under Section 395 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years and further they have been acquitted from the charges under Sections 379 and 412 IPC by the judgment and order dated 3.2.2013 passed by Sri Ravindra Prakash Sinha, the then Additional District and Sessions Judge, FTC No.1, Araria in Sessions Trial No. 338 of 2000/Trial No. 426 of 2002.

4. The prosecution case as per FIR, in short, is that a dacoity was committed in a Bus on Purnea-Araria road on 2.8.1999 at about 8.30 P.M. and passengers and other inmates were assaulted and articles were looted from them, which led to the institution of Araria P.S.Case No. 357 of 1999. It further appears from the record that during investigation appellant Deva Nand Yadav was arrested by police and one briefcase of CIBACA mark was recovered from his



possession and in whose confession police raided the houses of appellants Anil Yadav, Ashok Yadav and accused Janardan Yadav (not appellant) and Kamleshwari Yadav (not appellant) and from their possession air bags and chadar were recovered also. On post investigation charge sheet has been submitted. The impugned judgment further shows that suitcase and airbags have been put on Test Identification Parade conducted in presence of B.D.O., Araria wherein a suitcase and one air bag were identified by one Jholi Rishideo (P.W.12) and Bigaru Rishideo (P.W.11). After taking cognizance, the case has been committed to the court of sessions, which ultimately came to the file of Sri Ravindra Prakash Sinha, the then Additional District and Sessions Judge, FTC No.1, Araria for trial and disposal.

5. During trial altogether 19 witnesses have been examined on behalf of prosecution, details of which are as follows : P.W.1 is Satya Deo Yadav, P.W.2 is Rajendra Yadav, P.W.3 is Misri Lal Yadav, P.W.4 is Laxman Yadav, P.W.5 is Dinesh Prasad Yadav, P.W.6 is Mohan Yadav, P.W.7 is Ajai Kumar Singh, P.W.8 is Kasmuddin, P.W.9 is Akhtar, P.W.10 is Madan Paswan, P.W.11 is Begari Rishideo, P.W.12 is Jholi Rishideo, P.W.13 is Radhe Shyam Ram, P.W.14 is Sachhida Nand Deo, P.W.15 is Ramautar Mandal, P.W.16 is Wakil Prasad Basu, P.W.17 is Shushil Pd. Singh, P.W.18 is



Kashmira Singh (informant) and P.W.19 is Jai Shankar Mehta. On perusal of record it further appears that P.W.1, P.W.4, P.W.7, P.W.8, P.W.11 and P.W.12 appear to be passengers of the vehicle and though they have supported the prosecution case in their evidence but they have not supported the prosecution case so far identification of accused or recovery is concerned. It further appears that P.Ws. 3 and 6 are seizure list witnesses of the seized articles recovered from the accused appellants and other accused persons. Further it appears that they have not supported the factum of seizure in their presence and P.Ws. 1, 4, 7, 8, 9 and 19 have been declared hostile on behalf of prosecution and so far P.W.13 is concerned, he is S.I., who has recorded the statement of informant. So far other witnesses are concerned, P.W.18 is informant of this case, P.W. 13 is S.I. as well as I.O. of this case and P.W.14 is Officer-in-Charge of Araria Police Station, who has proved endorsement of fardbeyan, P.Ws.16 and 17 are S.I. & ASI respectively, who have conducted raid after information.

6. Defence of the appellants is complete denial of the occurrence and also recovery from their possession, false implication and innocence.

7. Learned trial court on consideration of the evidence has convicted all the appellants of all the appeals, mainly on the ground



that though T.I.P. chart has not been produced before the court but considered T.I.P. kept on record, on the ground that it is a public document the TIP shows P.W.11 Begari Rishideo and P.W.12 Jholi Rishideo had identified the suitcase and airbag, which have been recovered from the possession of appellant Dev Nandan Yadav and other appellants and, as such, the same can be looked into and also considering the fact that those articles were recovered from the possession of the appellants and, as such, he has convicted them under Section 395 IPC. However, he has acquitted other accused Janardan Yadav and Kamleshwari Yadav on the ground that articles seized from their possession have not been produced for Test Identification Parade (in short 'T.I.P.').

8. Contention of learned counsel for the appellants is that learned trial court has though relied upon the identification of the articles by P.Ws. 11 and 12 but they have not stated anything about identification by them in TIP about suitcase and airbags and further TIP chart has not been produced and furthermore the B.D.O. who has conducted the TIP has not been examined in the present case, as such, conviction of the appellants suffers from aforesaid infirmities which has not been considered by learned trial court. Further submission of learned counsel (*amicus curiae*) is that except one briefcase with CIBACA mark was recovered from the possession of appellant Dev



Nandan Yadav, there is nothing against them and so far other appellants are concerned, they have been made accused on the basis of confession made by appellant Dev Nandan Yadav and so far recovery against them is concerned, the evidence of police witnesses, including I.O. does not show that T.I.P. has ever been held and those witnesses have identified the articles, hence the conviction is not sustainable in the eye of law. Further submission of learned counsel for the appellants, including amicus curiae is that in this case B.D.O. , who has conducted the T.I.P. has not been examined and this causes serious prejudice to the defence as had he been examined he had been cross examined on the point about the looted bags identified in TIP and as to mode of conduct of T.I.P. and as to how much articles were mixed with the articles and what was the ratio and as to what was the feature mark while identifying their articles.

9. On the other hand, learned counsel for the State has supported the judgment on the ground that almost all the police witnesses, including I.O. (P.W.13) have stated about the arrest of Dev Nandan Yadav when the police on information raided the place and recovered briefcase with CIBACA mark and seizure list was prepared on which signature of appellant Dev Nandan Yadad was there and further T.I.P. chart though has not been produced before the court but also supports participation of the appellants in the dacoity, hence, the



judgment does not suffer from any infirmity and inconsistency in the eye of law.

11. Having considered the argument advanced by both sides and considered the evidence available on record it appears that learned trial court has passed the judgment on the basis of T.I.P. in which P.Ws. 11 and 12 have identified the articles but it is well established and held by Hon'ble Apex Court in several decisions that T.I.P. in itself is not a substantive piece of evidence rather evidence deposited in court is substantive piece of evidence and in the present case neither B.D.O. has been examined to show that in T.I.P., P.Ws. 11 and 12 had identified the articles, nor the evidence of I.O. and other police witnesses shows that TIP was conducted nor the evidence of P.Ws. 11 and 12 shows that they have identified the articles in the TIP rather evidence of P.W.12 shows that he had identified the articles in Police Station. A three-Judge Bench of Hon'ble Apex Court in a decision in the case of **Vaikuntam Chandrappa v. State of A.P.: AIR 1960 SC 1340** has also considered the aforesaid aspect of the matter and in paragraph-6 of the judgment has held as follows :

“6..... It is also true that the substantive evidence is the statement in court; but the purpose of test identification is to test that evidence and the safe rule is that the sworn testimony of witnesses in court as to the identity of the accused who are strangers to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding. There may be exception to



this rule where the court is satisfied that the evidence of a particular witness is such that it can safely rely on it without the precaution of an earlier identification proceeding.....”

12. It has been considered by the Hon’ble Apex Court in the said decision that the substantive evidence is the statement in court but the purpose of test identification is to test that evidence and the safe rule is that the sworn testimony of witnesses in court as to the identity of the accused who are strangers to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding. However, neither any substantive piece of evidence is available on record to show identification of the articles seized from the possession of the appellants are looted articles nor even T.I.P. chart has been produced nor prosecution has taken any step to examine the B.D.O. and non-examination of B.D.O. would certainly cause prejudice to the appellants as the defence has got no opportunity to cross examine him about the mode of the conduct of T.I.P. as well as the special feature of identification by witnesses P.Ws. 11 and 12 who have supposed to have identified the articles have not stated about participation in the T.I.P. or their identification in T.I.P..

13. Learned counsel for the State has submitted that appellant Dev Nandan Yadav has been arrested just after the



occurrence with a bag and that shows his involvement but to my opinion that itself is not sufficient as he has not been arrested at the time of occurrence rather after the occurrence and the bag which has been seized from him does not show the identification of those articles seized by police.

14. It appears that learned trial court has failed to consider the aforesaid infirmities in the prosecution case, as such, the impugned judgment suffers from infirmities and inconsistencies as pointed above.

15. Considering the entire discussions made above, I find that prosecution has miserably failed to prove its charge under Section 395 IPC also against the appellants.

16. Accordingly, these appeals are allowed. The impugned judgment and order is set aside. As appellants are on bail, they are directed to be discharged from the liabilities of their bail bonds.

(Vinod Kumar Sinha, J)

spa/-

AFR/NAFR	
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