

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.42 of 2009

Arising Out of PS.Case No. -0 Year- null Thana -null District- SEKHPURA

[Against judgment of conviction and order of sentence dated 7th January, 2009 and 13th January, 2009, respectively passed by the Additional Sessions Judge, Fast Track Court, IV, Sheikhpura, in S. T. No.669 of 2007/T.R. No.23 of 2009 arising out of Barbigha P.S. Case No.134 of 2006]

=====

Ram Ashish Ram @ Ram Ashish Darhi, son of late Ram Rup Darhi, resident of village- Choti Malma, P.S.- Sarmera, District- Nalanda.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

With

=====

Criminal Appeal (SJ) No. 66 of 2009

Arising Out of PS.Case No. -0 Year- null Thana -null District- SEKHPURA

[Against judgment of conviction and order of sentence dated 7th January, 2009 and 13th January, 2009, respectively passed by the Additional Sessions Judge, Fast Track Court, IV, Sheikhpura, in S. T. No.669 of 2007/T.R. No.23 of 2009 arising out of Barbigha P.S. Case No.134 of 2006]

=====

Dinesh Chaudhary, son of Bom Choudhary, resident of village-Amba Bigha, P.S.- Sare, District-Nalanda.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

=====

Appearance :

(In CR. APP (SJ) No.42 of 2009)

For the Appellant/s : Mr. Ashwani Kumar Sinha, Advocate

For the Respondent/s : Mr. Bal Mukund Pd. Sinha, APP

(In CR. APP (SJ) No.66 of 2009)

For the Appellant/s : Mr. Pankaj Kumar, Advocate

For the Respondent/s : Mr. Bal Mukund Pd. Sinha, APP

=====

CORAM: HONOURABLE MR. JUSTICE SANJAY PRIYA
CAV JUDGMENT



Date: 25-07-2018

By judgment of conviction and order of sentence dated 7th January, 2009, and 13th January, 2009, respectively passed by the Additional Sessions Judge, Fast Tract Court, IV, Sheikhpura, in S. T. No.669 of 2007/T.R. No.23 of 2009 arising out of Barbigha P.S. Case No.134 of 2006, both the Appellants have been convicted for the offence under Section(s) 395/397 Indian Penal Code and sentenced to undergo rigorous imprisonment for seven years. Further, Appellant Dinesh Choudhary has been convicted under Section 412 Indian Penal Code, but no separate sentence has been passed against Appellant Dinesh Choudhary under this count.

2. Prosecution case, in brief is that the informant, who is a victim lady (PW 2), gave her *fard-e-beyan* before the ASI of Barbigha PS on 01.11.2006 at 5.45 PM at Referral Hospital, Barbigha, alleging therein that on the same day at about 4.45 PM she along with her mother-in-law, Sita Devi (PW 6), sister-in-law, Vibha Devi, and villager, Babban Kumar Singh (PW 5), were going home from Barbigha after making purchase of articles in the market. As soon as they reached at the western end of Punesra Bagicha, about thirteen unknown young men armed with pistol, *Chhura* surrounded them and started assaulting them. They snatched golden chain, golden earring, golden booty and rupees three thousand from



the possession of the Informant. They also took a *Managal Sutra* having golden locket and *DANA* golden tops of the ear from her mother-in-law. It is further alleged that they also took golden chain, golden tops having *LARI*, *Payal* of silver and clothes from the possession of her sister-in-law. It is further alleged that they assaulted Baban Kumar Singh and took Rs.2,000/- from his possession. The miscreants tried to take away the informant by dragging her. They also assaulted her. But, on cry of the victim, passersby and villagers of Punesra arrived and thereafter the miscreants fled away. The police also arrived and the informant was taken to hospital where she got treatment and gave her statement.

3. The prosecution during trial has examined total eleven witnesses.

4. Manoj Kumar (PW 1) is seizure list witness. He has stated before the Court that he has no knowledge about the case. He has been declared hostile by the prosecution.

5. Rajeshwar Prasad Singh (PW 3) is a hearsay witness. He has stated that he heard about the occurrence. He cannot identify any accused because he had not seen them.

6. Upendra Singh (PW 4) has stated that on 01.11.206 in between 5 to 6 PM the dacoits committed *dacoity* near the orchard when the Informant was returning home from Barbigha



with her mother-in-law, sister-in-law and villager, Baban Singh. He has clearly stated that he had not seen any dacoits as they had fled away when he arrived at the place of occurrence. One criminal was arrested by the police.

During cross-examination, he has clearly stated that *dacoity* was not committed in his presence. As such, PW 4 is also not eye witness of the case.

7. Informant, Bobby @ Bobby Devi, (PW 2), mother-in-law of the informant, Sita Devi, (PW 6) and the villager, Baban Singh, (PW 5), have all appeared as eye witness during trial.

8. The Informant, PW 2, has stated in her evidence that on the alleged date of occurrence at about 5.30 PM, she had left Barbigha market along with mother-in-law (Sita Devi), sister-in-law (Vibha Devi) and villager (Bababn Kumar Singh) for her village Punesra and when they reached at the western end of the orchard of Punesra village, about 13 persons having arms in their hands surrounded them and started assaulting them with the butt of gun and pistol. They looted away her golden chain, Booty, earring, and *Mangal Stura* and silver *Payal* worth Rs.35,000/-. They also took Rs.3,000/- from her possession. She has further stated that criminal also took golden ear ring, top and *Mangal Sutra* of her mother-in-law. She further stated that her sister-in-law was also deprived of her



golden chain and silver *payal* and clothes by the criminals. Rupees two thousand was taken from Baban Singh. The villagers came on *halla* when the criminal started dragging her. On arrival of the villagers, criminal fled away and left her. She was treated in the hospital. She has identified both the Appellants in Court. She has identified her signature on the *fard-e-beyan* and has stated that her *fard-e-beyan* was recorded by the Police Officer and was read over to her.

In cross-examination, this witness has stated that Ramashish Dharhi was one of the person, who committed *dacoity*. She further identified other accused and stated that second persons (accused) standing in the dock was arrested by the police and villagers. She has further stated in cross-examination on behalf of Dinesh Choudhary that she had rupees three thousand in her possession after marketing. In para 8, she has stated that all the miscreants had not covered their face. Altogether, there were 12-13 persons, who had participated in the occurrence. She has stated in para 9 that accused Dinesh Choudhary had disclosed his name when he was brought at the P.S. after his arrest by the police.

9. Mother-in-law of the Informant, Sita Devi (PW 6) has stated in her evidence that on the date of occurrence about 6.00 PM she was coming back to her home from Barbigha after



purchasing some articles with daughter Vibha Devi and daughter-in-law, Bobby Devi. When they reached near mango orchard of village Punesra, they were robbed by the miscreants. The offenders had pistol and *Chhura* in their hands. They assaulted this witness and other persons accompanying her and took away articles from their possession. This witness sustained injury on her ear. She has stated in her evidence that her golden *Mangal Sutra* and ear ring were taken away by the offenders. Golden chain of her daughter, golden booty of her daughter-in-law, and silver Payal along with purchased articles were also taken away by the offenders. They also took away her daughter-in-law, but after arrival of the villagers and police they left her daughter-in-law and fled away. One of the offenders was arrested by the police, who had admitted his hand in the occurrence. This witness went to the dock and identified Ramashish Dharhi. This witness had gone near the dock of the accused and identified Ramashish Dharhi.

During cross-examination, she has stated that she did not attend Test Identification Parade, but she was examined by the Police. In para 4 of her cross-examination, she has stated that there was darkness at the time of occurrence. She has further stated in para 8 of her cross-examination that neither she nor her daughter-in-law was knowing the name of Ramashish, but the person, who



was arrested by the police, has disclosed the name of Ramashish before them. She has stated in cross-examination that when Baba Singh (PW 5) was not ready to handover the money to miscreants, then one shot was fired. Thereafter, Baban gave money. She has stated in her evidence that she had identified some persons at the place of occurrence, but no body was arrested there. One person was arrested at some distance from the place of occurrence. She and her daughter-in-law had gone to hospital and after treatment they returned home.

10. Third eye witness Baban Kumar Singh (PW 5) has stated that on 01.11.2006 at about 6.00PM he was returning home from Barbigha market with the informant, her mother-in-law and sister-in-law and when they reached near mango orchard between his village Punesra and Barbigha about 13 persons surrounded them and asked to deliver whatever they had. They also showed *Chhura*, *Hasuli* and Pistol to them. He has further stated that ornaments of gold and silver were taken away from the possession of the informant, her mother-in-law and sister-in-law. He has given specific detail of the ornaments in his statement. He has also stated that rupees two thousand was taken from his possession and he was assaulted by them due to which he had sustained head injury. The *dacoits* had taken away the informant towards west, but



on arrival of the villagers, they left her, but the informant was also injured. All the criminals had covered their face. He claimed to identify Dinesh Choudhary in the Court, but Dinesh Choudhary was not present at the time of his evidence. This witness has stated in para 3 that there was cloudy weather so it was not possible to see up to more distance than two feet. This witness has stated in para 8 of his evidence that he was not knowing and identifying Dinesh Chaudhary prior to the occurrence. He has also stated that no criminal was arrested at the spot, rather, at some distance one person was arrested. This witness has stated that he was treated in Barbigha hospital for the injury caused on his head. He has further stated that he had not identified any body on the spot.

11. Nityanand Pathak (PW 7) has stated that on 01.11.2006 at about 6.00 PM, he heard the sound of *Chor-Chor* and went at the orchard along with his villagers. There he saw Baban Singh (PW 5), Bobby Devi, (Informant) and her sister-in-law and mother-in-law (PW 6) injured. They were taken to Barbigha hospital for treatment. He stated that the Informant was recovered at some distance from the place of occurrence, who had been dragged by the offenders. He has stated that one person was arrested and ornaments of golden and silver were recovered from his possession.

During cross-examination, this witness has stated



that he remained with the injured for about seven minutes and thereafter, he left for his home.

12. PW 8 is the Doctor, who had examined the victims of this case on 01.11.2006 at Barbiga Hospital. The doctor has found three lacerated injuries and one abrasion on the person of Baban Singh caused by hard and blunt object. This injured was examined at 6.35 PM. Injuries were found simple in nature. Injury report of Baban Singh has been marked as Ext.2. He also examined Sita Devi (PW 6) at 7.00 PM and found one lacerated injury over right ear $\frac{1}{2}$ " x $\frac{1}{2}$ ". The injury was found simple in nature caused by hard and blunt substance. Injury report of Sita Devi has been marked as Ext.2/1. On the same day at 7.10 PM, he examined Vibha Devi and found one swelling over left temporal region of size 2" x 2" caused by hard and blunt substance, which was simple in nature. Injury report of Vibha Devi has been marked as Ext.2/2.

During cross-examination, this witness has stated that by snatching earring lacerated injury can be caused. Injuries found on the person of Baban Singh are not possible by fall. He has stated in para 12 that injured persons were out door patients. They went away after treatment. The OD Patient register is maintained in the hospital.

13. Ishwar Chandra Sharma (PW 9) was Block



Development Officer-cum-Circle Officer on 21.12.2006 and on that very date he had conducted Test Identification Parade of the seized articles of Barbigha P.S. Case No.134 of 2006. Sita Devi in presence of the witnesses, namely, Santosh Kumar and Rajiv Kumar, had identified her articles. Thereafter, this witness prepared Test Identification Parade Chart, which has been proved and marked as Ext.3.

During cross-examination, this witness has stated that he had received the order of Additional Chief Judicial Magistrate, Sheikhpura, for conducting Test Identification Parade and in the light of that order he had conducted Test Identification Parade on 21.12.2006 at Barbigha Police Station. He has further stated that four pieces of similar colour and construction were mixed with the seized articles and, thereafter, Test Identification Parade was conducted. This witness has further stated that independent witnesses, Santosh Kumar and Rajiv Kumar, were present at the Police Station and in their presence Test Identification Parade was conducted. He has further stated that seized articles were not recovered in his presence. Those articles were not put up before him in the Court.

14. Baban Ram (PW 10) is the Sub Inspector of Police. He has stated that seizure list of this case is in his



handwriting and signature. Witness Upendra Ram had signed on the seizure list in his presence and Manoj Kumar had put his LTI on it. The seizure list has been marked as Ext.4.

During cross-examination, this witness has stated that seized articles were recovered from the possession of accused Dinesh Chaudhary near Malti Pokhar of village Tetarpur. He has further stated in his cross-examination that Ranjan Kumar, the then Officer-in-Charge, Barbigha Police Station, had searched and seized the articles and on his order he had prepared the seizure list in the light of torch.

15. Ranjan Kumar (PW 11) is the Investigating Officer of the case. He has stated before the Court that on 01.11.2006 he was posted as Officer-in-Charge of Barbigha P.S. and on the same day at about 5.00PM, he received information about the commission of the *dacoity* in Punesra road and to verify the information he along with other Police Officers, namely, Baban Ram (PW 10), Vidya Sagar Sharma, Raj Ballabh Paswan and Constables proceeded for the place of occurrence. He saw several persons had assembled there. They disclosed that the criminals had taken away a female along with them. This witness along with police party proceeded towards the village Toigarh. On the way, he saw villagers returning with a female, who was in injured condition.



He immediately sent the injured for treatment with ASI, Raj Ballabh Paswan, and thereafter he started searching the criminals. In course of search, he received information that case has been registered on the statement of Bobby Devi (victim) and investigation of this case was handed over to him. He has further stated that at about 8.00 PM he saw a person near Malti Pokhar of village Tetarpur, who was attempting to hide himself from the police. He was chased and caught. He disclosed his name as Dinesh Choudhary. In the meantime, two villagers, Upendra Ram and Manoj Kumar also reached there and in their presence Dinesh Choudhary was searched and broken *Mangal Sutra*, golden ear tops, golden locket of the chain and one pair of *Bichhiya* made of silver were recovered from his possession. Those articles were seized and on his direction ASI, Baban Ram, (PW 10) prepared the seizure list. A copy of the seizure list was given to Dinesh Choudhary. Dinesh Choudhary was in drunken stage at that time. This witness has given description of the place of occurrence and has stated that he recorded the statement of the witnesses, who supported the occurrence before him. He also conducted Test Identification Parade of the seized articles on 21.12.2006 in presence of BDO, Barbigaha. After completion of investigation, he submitted charge-sheet against the accused persons.



This witness during cross-examination on behalf of Ramashish Dharhi has stated that none of the witnesses had disclosed the name of Ramashish Dharhi at the time of recording statement. During cross-examination on behalf of Dinesh Choudhary, this witness has stated in para 8 that *fard-e-beyan* and formal First Information Report of this case was not written either before him or by him. In para 10, he has stated that no Test Identification Parade of any accused was conducted by him. He has categorically stated in para 11 that he had apprehended Dinesh Choudhary, but the accused was not examined under Section 164 Cr.P.C. He has stated in para 12 that Dinesh Choudhary has no criminal history. He has further stated that Dinesh Choduhary was arrested after 45 minutes of the alleged occurrence in drunken condition.

16. In this manner, from scrutiny of the entire evidence of the prosecution witnesses, as discussed above in detail, it is apparent that none of the accused was put on Test Identification Parade. Informant (PW 2), her mother-in-law (PW 6) and villager, Baban Singh, (PW5) have identified the accused in the Court for the first time during their evidence. It is also apparent from the evidence of PW 9, BDO, that articles, which were alleged to have been seized from the possession of Dinesh Choudhary, had not been produced in



the Court at the time of his evidence. It further appears from the evidence of Sub Inspector of Police (PW 10) that in course of search he received information that case has been registered by Bobby Devi (victim) and investigation of this case was handed over to PW 11. He has stated that seized articles were recovered from the possession of accused Dinesh Chaudhary near Malti Pokhar of village Tetarpur. PW 11 (Investigating Officer) has stated that at about 8.00 PM he saw a person near Malti Pokhar of village Tetarpur, who was attempting to hide himself from the police. He was chased and caught. He disclosed his name as Dinesh Choudhary. He made search of Dinesh Chaudhary in presence of two villagers, Upendra Ram and Manoj Kumar and recovered broken *Mangal Sutra*, golden ear tops, golden locket of the chain and one pair of *Bichhiya* made of silver from his possession. He seized those articles and prepared the seizure list in presence of villager Upendra Ram and Manoj Kumar.

17. None of the seizure list witness has supported the case of the prosecution. One of the seizure list witness, Manoj Kumar, has been examined as PW 1, who has specifically stated in Court during his evidence that he has no knowledge about the case. The Investigating Officer has also admitted in his evidence that no Test Identification Parade of any of the accused was conducted by



him. He has stated in his evidence that Test Identification Parade of seized articles was conducted on 21.12.2006 in presence of BDO, Barbigaha. Sita Devi (PW 6) had identified some of the articles, which were said to be stolen property. Investigating Officer has stated in his cross-examination that none of the witnesses has disclosed name of Ramashish Dharhi (Cr. Appeal (SJ) No.42 of 2009) at the time of recording their statement. He has stated in his cross-examination in para 11 that he had apprehended Dinesh Chaudhary (Cr. Appeal (SJ) No.66 of 2009), but his statement was not recorded. He has stated in para 12 of his cross-examination that Dinesh Chaudhary has no criminal antecedents. He has further stated that Dinesh Chaudhary was arrested after 45 minutes of the alleged occurrence in drunken condition.

18. First Information Report has been registered against unknown. Informant (PW 2), mother-in-law of the Informant (PW 6) and villager of the Informant, Baban Kumar, (PW 5) , who have been examined as eye witnesses have all given description of the articles, which is alleged to have been recovered from the possession of Dinesh Chaudhary. From the evidence of PW 9, who had conducted Test Identification Parade of the articles, it appears that during Test Identification Parade, only Sita Devi (PW 6) was present. She had identified some of the articles, which she said



belonged to her. But, in the First Information Report there is no such description of articles belonging to Sita Devi (PW 6).

19. Both the accused have been charged under Section(s) 395/397 Indian Penal Code. To prove charge under Section(s) 395/397 Indian Penal Code, identification of the accused and recovery of the articles from their possession is most important ingredients.

20. Appellant, Dinesh Chaudhary, has been further charged for the offence under Section(s) 412 Indian Penal Code. It is alleged that looted articles have been recovered from his possession. But, from the evidence of the witnesses in the instant case, it appears that one of the accused, Dinesh Chaudhary, was arrested by the police on the same date of occurrence after about 45 minutes. Name of another accused, namely, Ramashish Dharhi, was disclosed by Dinesh Chaudhary. None of the accused was put on Test Identification Parade during investigation.

21. There is specific allegation that 10-13 miscreants had robbed the informant and her family members of their belongings. It has also come in the evidence of PW 5 that there was cloudy weather and it was not possible to see more than 2/3 feet. PW 5 has stated that no criminal was arrested on the spot, rather, at some distance, one person was arrested. First Information Report



has been lodged on the same day of occurrence. One accused, Dinesh Chaudhary, is said to have been arrested on the same day after 45 minutes of the occurrence, but he was not produced before the Informant or any of family member of Informant for identification during course of investigation. They have been identified by the witnesses for the first time in Court.

22. PW 2 has stated in her evidence that second accused standing in the dock was arrested by the police and villagers. She has stated that about 12-13 persons had participated in the occurrence. She has further stated that Dinesh Chaoudhary has disclosed his name when he was brought at the Police Station after his arrest. Informant (PW 2) has further stated in her evidence that name of Ramashish Dharhi was disclosed by Dinesh Chaudhary. Similarly, another eye witness PW 5 has stated in his evidence that he had not identified anybody at the place of occurrence. PW 6 has stated in her evidence that she has not attended any Test Identification Parade, but she was examined by the Investigating Officer. She has further stated that there was darkness at the time of occurrence. In para 8 of his cross-examination she has stated that neither she nor her daughter-in-law was knowing the name of Ramashish, but the person, who was arrested by the police, had disclosed the name of Ramashish Dharhi before them.



23. On the basis of aforesaid evidence of the witnesses, identification of both the Appellants as well as assertion made by the prosecution that the articles recovered from the possession of Dinesh Chaudhary, was looted articles becomes doubtful. The Court below appears to have convicted the Appellants mainly on the ground that articles have been recovered from the possession of Dinesh Chaudhary and the same was identified by the witness, Sita Devi (PW 6) during Test Identification Parade. The Court below appears to have given undue emphasis to identification of both the Appellants by PW 2, 5 and 6 in the Court, for the first time, at the time of their evidence. It appears that the Court below has totally failed to appreciate that in the occurrence of *dacoity* identification of the accused is of prime importance and unless prosecution comes out with reliable and unimpeachable evidence of identification of the accused, the case becomes doubtful.

24. In the instant case, it is admitted position that both the Appellants were never put on Test Identification Parade. They are not named in the First Information Report. They have never been produced in Court prior to evidence recorded in Court. Three witnesses (PW 2, 5 and 6) have for the first time identified both of them in Court. One of the Appellant, Dinesh Chaudhary, was arrested by the police on the date of occurrence itself and it is



alleged that some looted articles were recovered from his possession in presence of independent witnesses, but none of the independent witnesses have come forward to support the prosecution case. There is vivid description given in the First Information Report about the looted articles. The Court below has given great reliance to the Test Identification Parade of stolen articles held by PW 9, wherein, Sita Devi (PW 6) has allegedly identified some of the articles as belonging to her. The Court below has accepted the argument of the prosecution that those articles were looted articles. There is no specific mention in the First Information Report as what articles have been stolen from the possession of victims (PW 3, 5 and 6). In such circumstances, it was not possible for Sita Devi to identify the particular articles/ornaments belonging to her.

25. Therefore, this Court finds that conviction and sentence of the Appellants is not in accordance with law. The prosecution has failed to prove the Charge beyond all reasonable doubt.

26. Accordingly, impugned judgment of conviction and order of sentence dated 7th January, 2009, and 13th January, 2009, respectively passed by the Additional Sessions Judge, Fast Track Court, IV, Sheikhpura, in S. T. No.669 of 2007/T.R. No.23 of 2009 arising out of Barbigha P.S. Case No.134 of 2006, is hereby



set aside. The Appellants are acquitted of the Charge(s) levelled against them. They are discharged from the liability of their respective bail bonds.

27. These Criminal Appeals are, accordingly, **allowed.**

(Sanjay Priya, J)

J.Alam/-

AFR/NAFR	AFR
CAV DATE	11-05-2018
Uploading Date	26-07-2018
Transmission Date	26-07-2018

