

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.27 of 2011

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Ashok Yadav, Son of Janardan Yadav, Resident of Village - Simaria, P.S. -
Chandan, District - Banka.

.... Appellant/s

Versus

The State of Bihar.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Subodh Kumar Jha, Advocate.
Mr. Sarveshwar Tiwari, Advocate.
Mr. Jagat Narayan Singh, Advocate.
For the Respondent/s : Mr. Parmeshwar Mehta, APP.

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CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR

ORAL JUDGMENT

Date: 27-02-2018

Heard learned counsel for the appellant as well as learned
counsel for the appellant.

2. The sole appellant has preferred the present appeal
against the judgment of conviction and order of sentence dated
26.11.2010 and 27.11.2010 respectively passed by the learned
Additional Sessions Judge, F.T.C.-3rd, Banka in Sessions Trial No. 16 of
2010, whereby after having convicted the appellant, under Section 395
of Indian Penal Code, sentenced him along with one Sattan Yadav to
undergo rigorous imprisonment for a term of seven years and also to pay
a fine of Rs. 5,000/- for committing offence and in default of payment of
fine to further undergo sentence of six months.

3. The brief fact giving rise to the present case is that
informant Mahendra Paswan, PW-7, got recorded his self statement



before the police narrating the occurrence of dacoity committed in the brick kiln, alleging that in the night of 19.09.2009, he was at the brick kiln along with guard Naresh Yadav (PW-5), another guard Basudeo Yadav (PW-1), Munshi, Kashi Nath Pandit (PW-4) and Puran Tanti (not examined in this case), while they were sleeping around 11:00 O'clock in the night, 10-12 miscreants, all of a sudden, turned up there armed with *lathi* and *danda* assaulted them and on the point of pistol asked them to give money. The informant out of fear handed over cash of Rs. 6,050/- and one Nokia mobile of model-1600 with SIM No. 9939556061 and another Nokia mobile of model-1200 with SIM No. 9631803345, and also looted Nokia mobile of model-1200 from Naresh Yadav (PW-5) with SIM No. 9162160569, two other mobiles kept for charge bearing nos. 9939381192 and 9199196475 and one inverter, wrist watch and some utensils were taken by the miscreants. The guard of the brick kiln namely Naresh Yadav (PW-5) identified some miscreants and named them as Ashok Yadav, Bimal Yadav, Satan Yadav, Jhupar Pujhar, Dahru Khaira and claimed to identify rest others after seeing them.

4. The police after lodging the formal FIR commenced investigation and during course of investigation recovered Nokia mobile set of Model-1200 having IMEI No. 355733025892920 with SIM No. 9572031450 and finding sufficient evidence against the named accused persons, submitted charge sheet.

5. Learned counsel appearing on behalf of the appellant



submits that appellant is said to have been identified by Naresh Yadav (PW-5) and on that very basis, the appellant was named as accused in the FIR, however, the accused persons were not put on TIP during the course of investigation for identification and PW-5, in his testimony, has not supported the prosecution case and has denied to have identified any of the miscreants. The only evidence against the appellant is of identification in the court by PW-7, Mahendra Paswan (informant of this case) but the said identification has no evidentiary value for the reason that he himself has admitted in para-5 of his deposition that miscreants were shown to him while in police custody in the police station. He also submits that there is no recovery of any looted article from possession of the appellant and during course of investigation only one stolen Nokia mobile is said to have been recovered vide Ext. 3, the seizure list, but recovery is not from the possession of the appellant rather from another co-accused Bimal Yadav, who also happens to be the own brother of the appellant, but their residence is separate, as seizure list indicates that recovery is from the house of Bimal Yadav.

6. Learned counsel appearing on behalf of the State submits that appellant was identified in the court by PW-7, the informant, so his participation in the dacoity is proved during trial; besides this, recovery of one of the looted mobiles from possession of the Bimal Yadav, one of the accused, who also happens to be the own brother of the appellant.



7. Having considered the rival submissions, now the only pertinent question to be decided is whether charge against the appellant has been proved by the prosecution during trial. The trial court has placed reliance on the disclosure of name of the appellant by Naresh Yadav (PW-5) at the time of institution of the case. The trial court has also relied on the testimony of Naresh Yadav (PW-5) on the point of identification by him at the police station, which is not a correct approach. This fact also comes during the trial that there is no material on record to show that both were acquainted with each other prior to the occurrence. PW-5 Naresh Yadav in his testimony in para-4 categorically admits that he could not identify any of the miscreants. Identification of the appellant by PW-7 Mahendra Paswan in the court is not an admissible piece of evidence. Identification of an accused in the court is weak evidence, moreover, in the present case, he further admits that the appellant was shown to him by the police while he was in custody. But as earlier discussed, PW-5 Naresh Yadav has deposed that he had not identified any of the miscreants so evidence on the point of identification of the appellant by PW-7 is not an admissible piece of evidence. It is not corroborated by any other evidence.

8. Further, trial court has placed reliance to Ext. 3, the seizure list. The said document shows recovery of one Nokia mobile of model-1200 bearing IMEI No. 355733025892920 with SIM No. 9572031450, but looted Nokia mobile IMEI Nos. are not on the record



to ascertain the recovery of mobile from the appellant, hence recovery of any looted item from possession of the appellant too has not been proved by the prosecution. The appellant was made accused on the basis of disclosure of his name by Naresh Yadav, PW-5 to the informant but that is not proved by Naresh Yadav himself in the testimony before the court rather according to his testimony he could not identify any miscreant. Neither identification of the appellant nor recovery of any looted articles from the possession of the appellant has been proved. So participation of the appellant in the present offence is not proved by the prosecution beyond all reasonable doubt.

9. Therefore, in view of the discussions aforesaid, the appellant is acquitted from the charge of Section 395 of Indian Penal Code. Since he has already on bail, hence, also discharged from the liability of his bail bond. The appeal stands allowed.

(Arun Kumar, J)

Sujit/-

AFR/NAFR	NAFR
CAV DATE	NA
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