

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.459 of 2003

=====

Bipin Kumar Mahto, Son of Daroga Mahto, Resident of Village – Banwa Tola, P.S. – Bettiah Muffasil, Dist – West Champaran.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

with

=====

Criminal Appeal (SJ) No. 507 of 2003

=====

Ragho Yadav, Son of Kailash Yadav, Resident of Village – Parbatia Tola, P.S. – Bettiah (Muffasil), District – West Champaran.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

=====

Appearance :

(In CR. APP (SJ) No.459 of 2003)

For the Appellant/s : Mr. Sri B.N. Mishra, Adv.
Mr. Sanjeev Kumar, Adv.
Sri Brik Kumar Mishra Adv.

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

(In CR. APP (SJ) No.507 of 2003)

For the Appellant/s : Mr. Sri B.N. Mishra, Adv.
Mr. Sanjeev Kumar, Adv.
Sri Brik Kumar Mishra Adv.

For the Respondent/s : Mr. S.A. Ahmad, APP

=====

CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 03-04-2018

As both the above appeals arise out of same impugned judgment, they are being heard together and are being decided by this common order for the sake of convenience.

2. The above two appeals are directed against the judgment of



conviction and order of sentence dated 15.09.2003, passed by Shri Jai Prakash Singh, the then 5th Additional Sessions Judge, West Champaran, Bettiah, in Sessions Trial No. 252 of 2002, by which the appellants, in both the above mentioned appeals stood convicted under section 394 of the Indian Penal Coder (hereinafter referred to as the “IPC”) and were sentenced to undergo R.I. for five years with a fine of Rs. 1,000/- (Rs. One Thousand) each having default clause.

3. Prosecution case as per the fardbeyan of informant Prabhunath Kushwaha (P.W. 6) in short is that on the date of occurrence i.e. 11.08.2001, the informant, who was the peon in Central Cooperative Bank of Bettiah was going along with Branch Manager Indrajit Prasad and Cashier Janardan Das to deposit Rs. 1,33,511/- in treasury. The aforesaid amount was kept in a rexin bag and was being carried by the informant. They were on foot and when they reached near the civil court compound, the two persons of same age group of 22 to 27 years were standing near a bike and third person of similar age group came to the informant and tried to snatch the bag, which was protested by the informant then other accused, who was standing near the bike fired two shots on the informant, causing injuries to arm and leg of the informant, thereafter, the informant fell down and all the three accused persons after snatching the bag, fled away on motorcycle.

4. On the basis of the above fardbeyan Bettiah Town P.S. Case



No. 284/2011 was registered against unknown, later on appellants and one more accused was arrested and they were put on T.I.P. and appellants were identified by P.Ws 2 and 3.

5. T.I.P. was conducted and Police after investigation submitted charge-sheet against the appellants and one more co-accused under Section 395 of the IPC. The case was committed to the court of Sessions, which ultimately came to the file of Shri Jai Prakash Singh, the then 5th Additional Sessions Judge, West Champaran, Bettiah, for trial and disposal.

6. Charges were framed under Sections 395/397 of the IPC and Section 27 of the Arms Act.

7. To prove its case, prosecution examined altogether six witnesses. They are: P.W. 1 – Prem Bahadur Singh, declared hostile, P.W. 2 Indrajit Prasad, Branch Manager and claimed to be eye witness of the occurrence, P.W. 3 – Janardan Dubey, Cashier and claimed to be eye witness of the occurrence, P.W. 4 – Muktinath Rai, declared hostile, P.W. 5 – Baijnath Prasad, Advocate clerk and claimed to have seen the accused persons fleeing away, P.W. 6 – Prabhunath Kuswaha, informant and injured, P.W. 7- Sudhakar Singh, Judicial Magistrate, who held Test Identification Parade and P.W. 8 – Md. Yunus the Investigating Officer.

8. Apart from that T.I.P. Chart has been brought on record as Ext.



1, Fardbeyan as Ext. 2 and Formal F.I.R as Ext. 3.

9. Defence of the accused person is of complete denial of the occurrence and of false implication.

10. On conclusion of trial, the Trial Court, though not found the appellant guilty under Section 397/395 of the IPC and Section 27 of the Arms Act however, convicted the appellants 394 of the IPC and sentenced them in the manner aforesaid. By the said judgment, the trial court has acquitted other co-accused Jitendra Yadav.

11. Learned counsel, appearing on behalf of the appellants assailed the judgment on the ground that though they have been identified in test identification parade by two witnesses viz. P.W. 2 and P.W. 3 and test identification chart has also been brought on record but none of the witnesses have identified them in the court and the evidence of these witnesses disclosed that the accused persons were shown to these witnesses prior of holding the test identification parade, as such, their identification has no value in the eye of law. Further contention of learned counsel for the appellants that identification in test identification parade is not substantive piece of evidence rather it can be used for corroboration as held by Hon'ble Supreme Court in the case of **Sampat Tatyada Shinde v. State of Maharashtra** reported in AIR 1974 SC 791 and as such, conviction of the appellants under Section 394 is not sustainable in the eye of law.



12. On the other hand, learned counsel for the respondent - State has defended the judgment of trial court and submitted that the appellants have been identified by two witnesses in test identification parade and test identification parade chart has also been produced in the court and there is allegation against the appellants that they took away Rs. 1,33,511 by causing hurt to the informant and, therefore, there is no infirmity in the impugned judgment of Trial Court and conviction of appellants under Section 394 of the IPC is just and proper.

13. In the background of submission of the parties, from perusal of the evidence, it appears that P.W. 1 has been declared hostile in this case and P.W. 2, who is said to have identified both the appellants in test identification parade and though have supported the case of prosecution with regard to robbery, but evidence of this witness disclosed that he could not identify the accused in the court stating that he could not remember their faces and further his evidence in para 8 shows that after arrest of the accused, police brought them into the Bank and police informed him about test identification parade, on which this witness stated that he could not identify them but *Daroga Ji* told him that he will implicate him in a case and only due to fear he has identified the accused persons.

14. Evidence of P.W. 3 also disclosed that he supported the factum



of robbery and said to have identified the accused persons in T.I.P. but evidence of this witness also disclosed that police after arrest had brought the accused persons before him for identification.

15. P.W. 4 has been declared hostile. P.W. 5 the advocate's clerk and his evidence disclosed that accused persons after robbery were fleeing but he has not named the appellants or any other accused person. P.W. 6 is the informant and he has supported the factum of robbery but so far identification of appellants is concerned, he also has not identified the appellants in the dock. P.W. 7 is the Judicial Magistrate, who conducted test identification parade. P.W. 8 is the Investigation Officer

16. So far identification of the appellants are concerned, none of the witnesses have identified the appellants in dock. No doubt test identification chart and the evidence of P.W. 7, Judicial Magistrate and also the evidence of P.W. 8, Investigating Officer, disclosed that they identified the appellants in test identification parade held in jail. However, so far evidence of identification in test identification parade is concerned, I find force in submission of learned counsel for the appellants that the test identification parade, is not substantive piece of evidence rather it can be used for corroboration as held by Hon'ble Supreme Court in the case of **Sampat Tatyada Shinde (supra)** in which, the Hon'ble Apex Court while dealing with the case of similar



nature, held in para 16 as under:-

“16. The evidence of test identification is admissible under Section 9 of the Evidence Act; it is, at best supporting evidence. It can be used only to corroborate the substantive evidence given by the witnesses in court regarding identification of the accused as the order of the criminal act. The earlier identification made by the witnesses at the test identification parade, by itself, has no independent value. Nor is test identification the only type of evidence that can be tendered to confirm the evidence of a witness regarding identification of the accused, in court, as the perpetrator of the crime. The identity of the culprit can be fixed by circumstantial evidence also.

17. In the background of above settled principle of law, in the present case also, there is no substantive piece of evidence available on record, so far identification of appellants is concerned. No doubt, they have been identified in test identification parade but the said test identification parade as held above can only be used for corroboration and cannot be considered as substantive piece of evidence. Apart from that there are evidences of P.W. 2 and P.W. 3, which shows that before conducting the test identification parade, the police has brought the accused persons before them and evidence of P.W. 2 further goes to show that he identified the accused persons due to fear. However, the trial court has not considered these aspects in right perspective, while convicting the appellants under Section 394 of the IPC.



18. Accordingly, both the appeals are allowed. Judgment of conviction and order of sentence dated 15.09.2003, passed by Shri Jai Prakash Singh, the then 5th Additional Sessions Judge, West Champaran, Bettiah is set aside.

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

(Vinod Kumar Sinha, J)

sunil/-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	11.04.2018
Transmission Date	11.04.2018

