

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.129 of 2009

1. Fatinga Yadav, son of Late Yadu Yadav
2. Nakhidan Dusadh, son of Late Rambalak Dusadh, both resident of village-Bhuapur, P.S.-Jamhore, District-Aurangabad.

... .. Appellant/s

Versus

State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Krishna Prasad Singh-Sr. Advocate Mrs. Meena Singh-Advocate Mr. Bhaskar Shankar-Advocate Mr. Rakesh Singh-Advocate
For the Respondent/s	:	Mr. Parmeshwar Mehta-A.P.P.

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 20-11-2018

Appellants Fatinga Yadav and Nakhidan

Dusadh have been found guilty for an offence punishable under Section 395 of the I.P.C. and each one has been sentenced to undergo R.I. for 10 years as well as to pay fine appertaining to Rs.1,000/- and in default thereof, to undergo S.I. for two months, additionally, by the 1st Assistant Sessions Judge, Aurangabad vide judgment of conviction dated 20.01.2009 and order of sentence dated 21.01.2009 relating to Sessions Trial No.129 of 1983/ 74 of 1997.

2. PW-5, Kedar Singh gave his fard-bayan on 15.05.1982, divulging the fact that in the preceding evening at about 7.00 pm., the unknown dacoits raided his house and looted away his belongings (so detailed) including a double barrel gun



and during course thereof, also fired causing injuries to the Bikhari Singh, Bhikher Chand Singh, Gupta Singh. Further claimed identification of the dacoits, whereupon Barun P.S. Case No.68 of 1982 was registered under Section 395 of the I.P.C. and after completing investigation, chargesheet was submitted facilitating the trial, meeting with the ultimate result, subject matter of instant appeal.

3. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. It has also been pleaded that both the appellants happen to be resident of village-Bhuapur where land of informant lies. Appellant Fatinga Yadav was Bataidar under the informant while appellant Nakhidan Dusadh was a bonded labour under him. Because of the fact that informant had grudge against both of them on account thereof, subsequently getting an opportunity got them involved after taking the police under collusion. However, nothing has been adduced in defence.

4. In order to substantiate its case, altogether five PWs have been examined on behalf of prosecution, who are PW-1, Krishna Sharma, PW-2, Kanhaiya Sharma, PW-3, Lahasu Devi, PW-4, Umesh Sharma and PW-5, Dedar Singh. Side by



side, had also exhibited as Exhibit-1, signature of Kedar Singh over fard-bayan. As stated above, neither oral nor documentary evidence has been adduced in defence.

5. From perusal of the record, it is evident that I.O. has not been examined. It is also evident from perusal of the evidence of the PWs that there happens to be material contradiction on the score of identification. The impact of non-examination of the I.O. has been considered in depth in Apex Court reported in ***Baldev Singh v. State of Haryana reported in 2016 CRI.L.J. 154***, it has been held:-

“16. Contention at the hands of the learned Senior Counsel for the appellant is that non-examination of Chander Singh-SI who prepared rukka and who investigated the case raises serious doubts about the prosecution case. Material on record would show that Chander Singh-SI who investigated the case was not examined by the prosecution in spite of several opportunities. No doubt, it is always desirable that prosecution has to examine the investigating officer/police officer who prepared the rukka. Mere non-examination of investigating officer does not in every case cause prejudice to the accused or affects the credibility of the prosecution case. Whether or not any prejudice has been caused to the accused is a question of fact to be determined in each case. Since Ram Singh-PW-1 was a part of the police party and PW-1 has signed in all recovery memos, non-examination of Chander Singh-SI could not have caused any



prejudice to the accused in this case nor does it affect the credibility of the prosecution version.”

6. It is evident from the evidence of the witnesses that factum of dacoity is out of controversy. It is also evident that at an initial stage both the appellants along with others were not named, but subsequently they have been named and on account thereof, some of them were chargesheeted while some of them were not sent up for trial. The persons, who were chargesheeted, apart from both the appellants, Kameshwar Singh and Ramjanam Singh, both co-villager of the prosecution party. It is further evident that Kameshwar Singh had died while Ramjanam Singh escaped, whereupon vide order dated 19.09.2006, trial has been separated.

7. PW-1, PW-2, PW-3 and PW-5 are the family members while PW-4 is relative. It is further evident that PW-4 had not claimed identification of any of the accused including appellants, though substantiated the occurrence of dacoity.

8. Now, coming to the evidence of inmates of the house. PW-1, Krishna Sharma, during his examination-in-chief has substantiated the factum of dacoity and from the firing having been made at the end of the dacoits, caused injury to the Gupta Singh (not examined), Bhikhari Singh (not examined), Bhikharichand Singh (not examined). He has further claimed



identification of Ramjanam Singh, Kameshwar Singh, Nakhidan Dusadh and Fatinga Yadav amongst them in lantern light as well as torch having flashed at the end of the dacoits themselves. He has further stated that Ramjanam Singh and Kameshwar Singh were armed with pistol. He has further stated that Fatinga Yadav had assaulted him with slap. He has detailed the articles having been looted away by the dacoits. During cross-examination at Para-2, he has stated that soon after the occurrence, he had disclosed to his father regarding identification of the dacoits. In Para-5, he has stated that at village-Bhuapur, his land lies. Fatinga Yadav was his Bataidar. Nakhidan Dusadh was his labourer. It has further been admitted at his end that for the same year, Fatinga Yadav had not given grain of his share for which, they were insisting upon and on account thereof, there was grudge in between. On Court question at Para-6, he has stated that Fatinga Yadav and Nakhidan Dusadh have had concealed their face by *Galmochha*. Nothing has been recovered from their possession.

9. PW-2 has reiterated the version of the PW-1. He has further stated that dacoits have taken away gun, ornaments, cloth, utensils. Also disclosed that he had identified Kameshwar Sharma, Ramjanam Sharma, Nakhidan Ram, Fatigan Singh amongst the dacoits in torch light as well as lantern light. In Para-



2, there happens to be contradiction over identification of the dacoits. In Para-7, he has stated that he has got no concern with accused Fatinga Yadav. In Para-8, he has stated that he has got land in the village of the accused Fatinga Yadav, but he was not cultivating his land. In likewise manner at Para-9, he has stated that he has got no concern with the accused Nakhidan Dusadh. He denied the suggestion that he was labourer under them and further, as he left to do menial work on account thereof, he has been victimized.

10. PW-3 has also reiterated the same version supporting the factum of dacoity whereunder dacoits took away their belongings and further, claimed identification of Nakhidan Dusadh, Fatigan, Ramjanam Singh, Kameshwar Singh amongst the dacoits in lantern light as well as in torch light. In Para-2, she has admitted that Nakhidan Dusadh was doing menial work at her place. In Para-3, she has admitted that Fatinga Yadav was her Bataidar. She has further stated that Fatinga Yadav and Nakhidan Dusadh, both of them have concealed their face by Galmocha. In Para-4, she has stated that she had identified those persons while they were at darwaza. In Para-8, she has admitted that Nakhidan had relinquished to work under them. Fatinga Yadav was cultivating their land, whereupon he claimed Bataidhari and on



account thereof, they were trying to dispossess him, which he was not ready.

11. PW-5 is the informant, who has reiterated his earlier version regarding commission of dacoity as well as sustaining of firearm injury by Bhikhar Chand Singh, Bhikhari Singh and Gupta Singh, on account of firing having been made at the end of the dacoits. Dacoits have taken away cash appertaining to Rs.2,50,000/-, ornaments, cloth, apparel, utensils, double barrel gun. He has also claimed identification of Ramjanam Singh, Kameshwar Singh, Fatinga Yadav, Nakhidan Dusadh. During cross-examination at Para-4, he has stated that Kanhaiya and Krishna are his sons. After leaving of dacoits from the house, he had gone at his house and stayed for 5-10 minutes and then thereafter, returned back to Khaliyan. He met with Krishna and Kanhaiya at his house. Khaliyan lies one and half bansh away from his house. He has further stated that about half an hour after arriving at hospital, police came where he had given his fard-bayan. He has not disclosed names of any of the culprit in the fard-bayan as he was not in a fit mental condition. At Para-6, he has admitted that he has got ten bigha of land at village-Bhuapur. Fatinga Yadav used to cultivate the land on Batai. The accused Nakhidan Dusadh was his labour.



12. From the evidence as disclosed hereinabove, it is evident that four witnesses, who are family members have claimed identification of the appellants by name and face during course of trial. There happens to be consistent view that identification for the first time in Court is to be accepted, subject to consideration of other circumstances visualizing from the record. That means to say, the Court has to see whether identification for the first time in Court is inspiring confidence or not. If not, then in that circumstance, the same is liable to be rejected, so far facts of the present case is concerned, it is evident that all the appellants were known to the prosecution party since before, even then having absence at an initial version.

13. In ***Dana Yadav @ Dahu and others vs. State of Bihar reported in (2002) 7 SCC 295***, it has been held:-

“6. It is also well settled that failure to hold test identification parade, which should be held with reasonable despatch, does not make the evidence of identification in court inadmissible rather the same is very much admissible in law. Question is what is its probative value? Ordinarily identification of an accused for the first time in court by a witness should not be relied upon, the same being from its very nature, inherently of a weak character; unless it is corroborated by his previous Identification in the test



identification parade or in any other evidence. The purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what a witness has seen earlier, strength or trustworthiness of the evidence of identification of an accused and to ascertain if it can be used as reliable corroborative evidence of the witness identifying the accused at his trial in court. If a witness identifies the accused in court for the first time, the probative value of such uncorroborated evidence becomes minimal so much so that it becomes, as a rule of prudence and not law, unsafe to rely on such a piece of evidence. We are fortified in our view by catena of decisions of this Court in the cases of [Kanta Prashad v. Delhi Administration](#), AIR (1958) SC 350, [Vaikuntam Chandrappa \(supra\)](#), [Budhsen \(supra\)](#), [Kanan and Ors. v. State of Kerala](#), [1979] 3 SCC 319, [Mohanlal Gangaram Gehani v. State of Maharashtra](#), [1982] 1 SCC 700, [Bollavaram Pedda Narsi Reddy \(supra\)](#), [State of Maharashtra v. Sukhdev Singh and Anr.](#), [1992] 3 SCC 700, [Jaspal Singh alias Pali v. State of Punjab](#), [1997] 1 SCC 510, [Raju alias Rajendra v. State of Maharashtra](#), [1998] 1 SCC 169, [Ronny alias Ronald James Alwaris, \(supra\)](#), [George and Ors. v. State of Kerala and Anr.](#), [1998] 4 SCC 605, [Rajesh Govind Jagesha, \(supra\)](#), [State of H.P. v. Lekh Raj and](#)



Anr., [2000] 1 SCC 247 and *Ramanbhai Naranbhai Patel and Ors. v. State of Gujarat*, [2000] 1 SCC 358.

7. Apart from the ordinary rule laid down in the aforesaid decisions, certain exceptions to the same have been carved out where identification of an accused for the first time in court without there being any corroboration whatsoever can form the sole basis for his conviction. In the case of *Budhsen (supra)* it was observed:-

"There may, however, be exceptions to this general rule, when for example, the court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration."

8. In the case of *State of Maharashtra (1992)3 SCC 700*, it was laid down that if a witness had any particular reason to remember about the identity of an accused, in that event, the case can be brought under the exception and upon solitary evidence of identification of an accused in court for the first time, conviction can be based. In the case of *Ronny alias Ronald James Alwaris and Ors. (supra)*, it has been laid down that where the witness had a chance to interact with the accused or that in a case where the witness had an opportunity to notice the distinctive features of the accused which lends assurance to his testimony in court, the evidence of identification in court for the first time by such a witness cannot be thrown away merely because no test Identification parade was held. In that case, the concerned accused had a talk with the identifying witnesses for about 7/8 minutes. In these circumstances, the conviction of the accused, on the basis of sworn testimony of witnesses identifying for the first time in court without the same being corroborated either by previous identification in the test identification parade or any other evidence, was upheld by this Court. In the case of *Rajesh Govind Jagesha (supra)*, it was laid down that the absence of test identification parade may not be fatal if the accused is sufficiently described in the complaint leaving no doubt in the mind of the court regarding his involvement or is arrested on the spot immediately



after the occurrence and in either eventuality, the evidence of witnesses identifying the accused for the first time in court can form the basis for conviction without the same being corroborated by any other evidence and, accordingly, conviction of the accused was upheld by this Court. In the case of State of H.P. (supra), it was observed that

"test identification is considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them. There may, however, be exceptions to this general rule, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely without such or other corroboration."

In that case, laying down the aforesaid law, acquittal of one of the accused by High Court was converted into conviction by this Court on the basis of identification by a witness for the first time in court without the same being corroborated by any other evidence. In the case of Ramanbhai Naranbhai Patel and Ors. (2000)1 SCC 358, it was observed:

"It, therefore, cannot be held, as tried to be submitted by learned counsel for the appellants, that in the absence of a test identification parade, the evidence of an eyewitness identifying the accused would become inadmissible or totally useless; whether the evidence deserves any credence or not would always depend on the facts and circumstances of each case."

The Court further observed

"the fact remains that these eyewitnesses were seriously injured and they could have easily seen the faces of the persons assaulting them and their appearance and identity would well remain imprinted in their minds especially when they were assaulted in broad day light."

In these circumstances, conviction of the accused was upheld on the basis of solitary evidence of identification by a witness for the first time in court."



14. Now, the facts of the case is to be seen whether the same fulfills the parameter so prescribed by the Hon'ble Apex Court over its reliability. From the evidence, it is apparent that initially, none of the appellants including others were named. It is also evident that none of the appellants including others have been put on T.I.P. It is also evident that whoever been chargesheeted, are either co-villagers or employed under the informant. There happens to be complete absence at their end that the dacoits have concealed their identity by way of wrapping their face. There happens to be no evidence that appellants tried to flee or became absconder. Furthermore, it is apparent that on one pretext or other, prosecution party were aggrieved one and was trying to remove Fatinga Yadav as he was not inclined to relinquish his claim as Bataidar. Further, Nakhidan escaped from being bonded labour. So, procuring presence of appellants as an accused at subsequent stage smacks foul play, whereupon, could be accepted. More particularly, for want of absence of independent witnesses, at least the injured.

15. For want of non-examination of the I.O., the real theme could not be found exposed, at least at what stage appellants have been dragged by the prosecution. In likewise manner, material development, exaggeration having in the



evidence of the prosecution witnesses could not be properly brought up on the record. After having cumulative appreciation of the evidences coupled with circumstances visualizing from the record, irrespective of having identified by four witnesses, appellants are held to be entitled for acquittal. Consequent thereupon, judgment of conviction and sentence recorded by the learned lower Court is set aside. Appeal is allowed. Both the appellants are on bail, hence are discharged from its liabilities.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	26.11.2018
Transmission Date	26.11.2018

