

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.54 of 2013

Arising Out of PS.Case No. -34 Year- 2010 Thana -null District- BANKA

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Jitendra Das, son of Bisheshwar Das, resident of village Bhanrtola, P.S. Katoria,
District Banka. Appellant.

Versus

The State of Bihar. Respondent.

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Appearance :

For the Appellant : Mr. Vikram Deo Singh, Advocate.

For the Respondent : Mrs. Abha Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL

ORAL JUDGMENT

Date: 26-09-2018

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

2. This criminal appeal has been preferred against
the judgment and order of conviction dated 05.12.2012 and
order of sentence dated 12.12.2012 passed by the learned
Adhoc Additional Sessions Judge- IV, Banka in Sessions
Trial No. 1059 of 2010, arising out of Katoria P.S. Case
No. 34 of 2010, whereby the learned trial court convicted
Jitendra Das for the offence punishable under Section 394
and 412 of the Indian Penal Code and sentenced him to
undergo R.I. for five years and also slapped him with a fine



of Rs. 2,000/- and in default of payment of fine to undergo R.I. for 2 months under Section 394 of the Indian Penal Code and further sentenced him to undergo R.I. for three years and slapped him with a fine of Rs. 1000/- and in default of payment of fine to undergo R.I. for 1 month under sections 412 of the Indian Penal Code. Barring fine both the sentences were directed to run concurrently.

3. The factual matrix of the case is that Katoria P.S. Case no. 34 of 2010 was instituted under Section 394 of the Indian Penal Code against the four unknown miscreants on the basis of fardbeyan of Arvind Yadav, son of Baldeo Yadav recorded by A.S.I. Rajnarayan Singh of P.S. Katoria on 16.02.2010 at 7:00 A.M. at the Referral Hospital, Katoria with the allegation in succinct that on 16.10.2010 at about 1:00 A.M. in the night he was sleeping in his house. He woke up responding the knocking the main door of his house. When he along with his family members stepped out of his house he witnessed four accused persons armed with axe and lathi standing. In the meantime, the person armed with axe assaulted him by means of axe on his head and right rib inflicting bleeding injury to him while other three accused persons entered into the house and



looted away ornaments, attire and three mobile. All the accused persons had covered their face by means of 'Gamcha'. He claims to identify the looted articles and miscreants witnessing them.

4. The aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted chargesheet against the accused Jitendra Das and Babuwa @ Kudrat Ansari.

5. On receiving the chargesheet and the case diary and perusing the same, the learned Magistrate took cognizance of the offence under Section 394/412 of the IPC against the aforesaid accused persons and committed the case to the Court of Session. Subsequently the case of Babuwa @ Kudrat Ansari was referred to the Juvenile Justice Board finding him minor. Finally the case came in seisin of the Adhoc Additional Sessions Judge- IV, Banka for trial. Thus, only one accused Jitendra Das faced the trial.

6. Charge under Sections 394 and 412 of the Indian Penal Code was framed against the accused and charge was read over and explained to the accused by the court to which he pleaded not guilty and claimed to be tried.



7. To substantiate its case, in ocular evidence, the prosecution has examined altogether nine prosecution witnesses namely, Sarojani Devi as PW-1, Baldeo Yadav as PW-2, Sumitra Devi as PW-3, Sanoj Yadav as PW-4, Arbind Yadav, the informant as PW-5, the I.O. Baleshwar Yadav as PW-6, Suresh Yadav as PW-7, Shanta Prasad Yadav as PW-8 and Madan Tanti as PW-9. Out of the aforesaid witnesses, PW-7 happens to be the formal witness who has proved the signature on the fardbeyan and P.W.9 turned hostile. . In documentary evidence, the prosecution has filed and proved certain documents.

8. The statement of the accused was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence claiming himself to be innocent. In buttress of its case, the defence has neither adduced any ocular nor documentary evidence.

9. After hearing the parties and perusing the record, the learned trial court passed the impugned judgment and order of conviction and sentence as detailed in the earlier paragraph.

10. Being aggrieved and dissatisfied with the



aforesaid judgment and order of conviction and sentence, the convict has preferred the present Criminal Appeal.

11. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charges levelled against the appellant beyond all reasonable doubts or not.

12. It is submitted by learned counsel for the appellant that admittedly the accused persons had muffled their face by means of 'Gamcha' at the time of occurrence and the informant has not identified any of the accused persons during course of occurrence as he had not named the accused in the F.I.R. but in quite contradiction of aforesaid case P.W.4-Sanoj Yadav whose room was also robbed by the accused persons at the time of occurrence has claimed to have identified the appellant and one another accused, namely, Babuwa @ Kudrat Ansari stating that they had not covered their face rather had kept their face opened during the course of occurrence. As P.W.4 happens to be one of the tenants of the house robbed by the accused persons and had he identified the accused during the course of occurrence he should have disclosed the name of the aforesaid accused persons to the informant at the place of



occurrence before lodging of the F.I.R. and the name of the accused must be reflected in the F.I.R. but he did not do so which creates serious doubt about the prosecution case. It is further submitted that one looted mobile is said to have been seized from the possession of the appellant and one another accused Babuwa @ Kudrat Ansari but the number of SIM seized from their possession does not tally with that mentioned in the fardbeyan as well as in the examination-in-chief of the informant. Though P.W.4 has stated that he and the informant had identified the mobile in T.I.P but the informant has not corroborated the identification of the aforesaid mobile by him and moreover the T.I.P. chart of the aforesaid mobile has also not been brought on record by the prosecution. It is further submitted that P.W.4 is said to have identified the appellant and the another accused during the course of occurrence in the bulb light flashing at the place of occurrence at the time of occurrence but neither the informant nor any other witness has stated about litting of the light at the place of occurrence at the time of occurrence and the I.O. has also not found any bulb light at the place of occurrence. Thus, there was no source of identification of the appellant during



the course of occurrence. None of the seizure list witnesses barring P.W.9 has been examined by the prosecution. Moreover P.W.9 has turned hostile and hence for want of examination of seizure list witnesses the seizure of the mobile from the possession of the appellant and one another accused does not stand established by the prosecution to establish the complicity of the appellant in the occurrence. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case and complicity of the appellant in the occurrence by adducing consistent, trustworthy and reliable ocular and documentary evidence. Hence, the impugned judgment and order of conviction and sentence passed by the learned Trial Court is liable to be set aside and the appellant is liable to be acquitted.

13. On the other hand, learned APP advocating the correctness and validity of the impugned judgment and order of conviction and sentence, submitted that the informant has supported the occurrence in toto and other witnesses also corroborated the aforesaid occurrence. P.W.4 who happens to be occupant of the said house and the victim has identified the appellant during the course of occurrence and he has also identified the looted mobile



recovered from the possession of the appellant in T.I.P and the learned Trial Court correctly appreciating the facts and evidence on record has rightly passed the impugned judgment and order of conviction and sentence, which is liable to be upheld and this appeal is shorn of merit and is liable to be dismissed.

14. To substantiate the prosecution case, the prosecution has examined altogether six material witnesses in the case including the informant. From perusal of the testimony of the aforesaid witnesses, it appears that though PW-1, PW-2 and PW-8 have supported the occurrence of committing robbery in the house of the informant and PW-4 and PW-5 have supported occurrence of committing robbery in the house of informant and in room of PW-4 who happens to be tenant of one of the rooms of the said house by the accused persons at the time of occurrence but barring PW-4 none has claimed to identify the accused in the occurrence as P.W.1-Sarojani Devi, who happens to be wife of the informant and was present at the place of occurrence at the time of occurrence has stated in para-2 of her examination-in-chief that all the accused persons had covered their face by means of 'Gamcha' and she did not



identify any one of them. Likewise P.W.2-Baldeo Yadav, who happens to be father of the informant, has stated in para-3 of his examination-in-chief that he did not identify any of the accused persons. P.W.3-Sumitra Devi, who happens to be mother of the informant and who was also present at the place of occurrence at the time of occurrence has stated in para-2 of her examination-in-chief that she could not identify any of the accused persons in the occurrence. She also not heard the name of any of them in the occurrence. She has also denied to identify the accused in the dock. P.W.8-Shanta Prasad Yadav has stated in para-1of his examination-in-chief that when he arrived at the place of occurrence responding hulla, he did not witness any of the accused persons committing the occurrence. In para-4 of his cross-examination, he has further stated that he did neither witness nor identify any accused persons at the place of occurrence rather people present there divulged him about the occurrence of dacoity and moreover the informant P.W.5-Arbind Yadav (informant) has stated in para-5 of his examination-in-chief that he could not disclose the name of the persons involved in the dacoity. He did not identify any of them. It was not learnt as to who were



involved in the dacoity even later on. Though P.W.4-Sanoj Yadav, who happens to be the tenant of one of the room the aforesaid house and who was also robbed by the dacoits during the occurrence has stated in para-4 of his examination-in-chief that he had identified the dacoits involved in the occurrence. Munna Mastan and Jitendra Das had arrived to him. He had identified them in the bulb light. He has also identified the appellant in the dock. In para-12 of his cross-examination he has further stated that bulb of his room was flashing since before and thus, he has claimed to identify the appellant in course of occurrence in the bulb light, but as he happens to be tenant of the informant and was present at the place of occurrence at the time of occurrence besides the informant but the F.I.R. was lodged by the informant on 16.02.2010 at 7 AM i.e. after six hours of the occurrence against unnamed miscreants, so the million dollar question arises that once the P.W.4 identified the appellant and another accused in the occurrence why he did not disclose the name of the appellant and other accused to the informant preceding to filing of the F.I.R. and even later on which remained unanswered and creates serious doubts about the veracity of the aforesaid statement of



P.W.4. P.W.4 has claimed to have identified the appellant and other accused in the bulb light flashing at the place of occurrence at the time of occurrence, but none of the witnesses including the informant has supported the factum of flashing of the bulb at the place of occurrence at the time of occurrence and the I.O. has also not found any bulb flashing at the place of occurrence. The only source of identification is said to be the bulb light but the aforesaid aspect of the case creates serious doubt about the identification of the appellant and other accused by P.W.4 at the time of occurrence in the bulb light. Moreover, P.W.4 has stated in para-13 of his cross-examination that whatever statement he has given before the Court has not been disclosed by him to the I.O. The aforesaid statement of P.W.4 candidly indicates that he has taken altogether different stand before the Court regarding identification of the appellant during the course of occurrence and he does not happen to be worth credence and reliable witness regarding aforesaid aspect of the case and his aforesaid testimony does not inspire my confidence to hold conviction of the appellant relying upon it.

15. From perusal of the record, it appears



that the alleged looted mobile is said to have been recovered from the possession of the appellant and accused Babuwa @ Kudrat Ansari. But, from perusal of the seizure list and record, it appears that SIM card number of the looted mobile as adumbrated in the fardbeyan and statement of informant and PW-4 does not matches with that recovered from the possession of the accused. Though, IMEI numbers of seized mobile have been mentioned in the seizure list but the same is not found figured either in the fardbeyan or statement of PW-4 and PW-5 to enable to ascertain that the seized mobiles are looted one. Moreover no seizure list witnesses of the aforesaid mobiles barring Madan Tanti (P.W.9) has been examined by the prosecution and the said Madan Tanti turned hostile. Thus, search and seizure of the aforesaid mobiles do not stand established by seizure list witnesses. Though P.W.4 has stated in para-6 of his examination-in-chief that the police had recovered the stolen article and summoned them for identification of the same and he and Arbind (informant) had identified their mobile but no T.I.P. chart has been brought on record and more so informant has not whispered about the identification of looted mobile by him in T.I.P. Thus, the



seizure of looted mobile from possession of the appellant also does not stand established by the prosecution.

16. In the facts and circumstances of the case, I find and hold that the prosecution has utterly and miserably failed to substantiate the complicity of the appellant in the occurrence beyond all reasonable doubts by adducing consistent, trustworthy and reliable ocular and documentary evidence. Hence, the impugned judgment and order of conviction and sentence passed by the learned Trial Court against the appellant is set aside and the appellant is acquitted from the charges levelled against him giving him benefit of doubt. As the appellant is on bail, he is discharged from the liability of his bail bonds. Accordingly, this appeal is allowed.

(Prakash Chandra Jaiswal, J.)

Trivedi/-

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