

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.208 of 2013

Arising Out of PS. Case No.-25 Year-2009 Thana- KATRA District- Muzaffarpur

Sidheshwar Sahani @ Singhewar Sahni S/o Late Raje Sahani @ Radhey
Sahni Resident of Village- Pitauihiya, P.S.- Hathauri, District- Muzaffarpur

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

Criminal Appeal (SJ) No. 247 of 2013

Arising Out of PS. Case No.-25 Year-2009 Thana- KATRA District- Muzaffarpur

1. Subhadra Sahni S/o Sone Lal Sahni Resident of Village Katai,
P.S. Kutra, District Muzaffarpur.
2. Swarath Ram S/o Sibath Ram Resident of Village Katai, P.S.
Kutra, District Muzaffarpur.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

(In Criminal Appeal (SJ) No. 208 of 2013)

For the Appellant/s : Mr. Jitendra Narain Sinha
Mr. Prince Kumar Mishra, Amicus Curiae

For the State : Mr. Binod Bihari Singh (App)

(In Criminal Appeal (SJ) No. 247 of 2013)

For the Appellant/s : Mr. Prince Kumar Mishra, Amicus Curiae
For the State : Mr. Sujit Kumar Singh, APP

**CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA
JAISWAL**

ORAL JUDGMENT

Date : 22-11-2018

As both the aforesaid criminal appeals have
cropped up from the same judgment and order of conviction
and sentence, hence, they are taken up together for
consideration and disposed of by this common judgment.



2. Heard Mr. Jitendra Narain Sinha learned counsel for the appellant of Cr. Appeal (SJ) No. 208 of 2013, Mr. Prince Kumar Mishra, learned amicus curiae for the appellants and learned APP for the State on the aforesaid two Criminal Appeals.

3. The aforesaid two criminal appeals have been preferred against the judgment and order of conviction dated 26.02.2013 and order of sentence dated 28.02.2013 passed by learned 9th Addl. Sessions Judge, Muzaffarpur in Sessions Trial no. 511/2010 / 321/2012 arising out of Katra P.S. Case No. 25 of 2009 whereby the learned trial court convicted the accused Md. Alam, Swarath Ram, Singhewar Sahani and Subhadra Sahni for the offence punishable under Section 395 read with Section Section 397 of the Indian Penal Code and sentenced them to undergo R.I. for seven years and also slapped them with a fine of Rs. 5000/- each and in default of payment of fine to further undergo R.I. for one month under the aforesaid Section.

4. The factual matrix of the case is that Katra P.S. Case No. 25 of 2009 was instituted under Sections 395/397 of the Indian Penal Code against 15-20 unknown miscreants on the basis of fardbeyan of Tej Narayan Pandit



S/o Dukha Pandit recorded by S.I. K.M. Singh, S.H.O. P.S. Katra on 21.02.2009 at 04:00 AM at the door of Tej Narayan Pandit with the allegation, in succinct that in the night of 21.02.2009, the informant was sleeping in his house along with his family members at around 12:30 AM, abruptly 8-10 miscreants intruded into his courtyard by breaking open the door of the rooms and started committing dacoity in his house. On protest made by them, they assaulted them by means of bamboo and made them injured. They also exploded bomb to scare them. 8-10 miscreants were committing dacoity in his house while others were standing outside his house. They looted away silver and golden ornaments and cash of Rs. 20,000/- by breaking open the box. They were 15-20 in numbers and he identified them in the torchlight and has claimed to identify them again witnessing them. After committing dacoity in his house, the accused persons committed dacoity in the house of Swarath Pandit, Ganga Dhar Pandit, Sukun Das and Lal Bihari Das and assaulted him, Ram Kumari Devi, Gulabiya Devi, Janarsi Devi, Mahendra Pandit and Sadhu Saran Das during the course of occurrence. After committing dacoity, the accused persons left the scene. The villagers had witnessed the occurrence.



5. The aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted charge-sheet against accused Subhadra Sahni, Swarath Ram @ Aithanwa, Sidheswar Sahni and Md. Alam under Section 395 read with Section 397 of the Indian Penal Code keeping the investigation pending against rest accused persons.

6. On receiving the charge-sheet and the case diary and perusing the same, the learned Magistrate took cognizance of the offence and committed the case to the court of sessions, and after commitment and on transfer finally the case came in *seisin* of the learned 9th Addl. Sessions Judge, Muzaffarpur for trial.

7. Charge against the aforesaid accused was framed under Section 395 read with Section 397 of the Indian Penal Code. Charge was read over and explained to them by the court to which they pleaded not guilty and claimed to be tried.

8. To substantiate its case, in ocular evidence, the prosecution has examined altogether seven prosecution witnesses namely, Ram Kumari as PW-1, Sukan Das as PW-2, Lal Bihari Das as PW-3, Dukha Pandit as PW-4, informant Tej Narayan Pandit as PW-5, Mahendra Pandit as PW-6 and



Prabhat Kumar as PW-7. Out of the aforesaid witnesses, PW-2 and PW-3 turned hostile while PW-7 happens to be formal witness. In documentary evidence, the prosecution has also filed and proved some documents in the case.

9. The statement of the accused persons was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence claiming themselves to be innocent. The accused have neither adduced any ocular nor documentary evidence in buttress of their case.

10. 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.

11. Being aggrieved and dissatisfied with the aforesaid judgment and order of conviction and sentence, the convicts have preferred the present Criminal Appeal.

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

13. It is submitted by learned counsel for the



appellant Sidheshwar Sahni and learned *amicus curiae* that as per the prosecution case as adumbrated in the fardbeyan and witnesses account, it was mid and dark night at the time of occurrence and they had identified the appellants in the torchlight and as per the account of informant, bulb was litting at the place of occurrence at the time of occurrence and he had also identified them in the bulb light, but neither the aforesaid torch or bulb has been seized by the I.O. nor produced before the court. Thus, the source of identification has not been established by the prosecution and without any source of information, it was not possible to identify the appellants in such a dark night. The aforesaid aspect of the case creates serious doubt about the prosecution case and complicity of the appellants in the occurrence. It is further submitted that as per the account of PW-1 (Ram Kumari Devi), the accused persons were their co-villager and known to her and she had identified them as they happen to be her co-villager and as per the account of PW-6 (Mahendra Pandit), he had also identified the accused persons in the occurrence and divulged their name to the informant within one hour of the occurrence and the FIR was lodged after three and half hours of the occurrence which means preceding to the lodging of the FIR and giving



fardbeyan by the informant, the informant had come to know the name of the appellants in the occurrence, but he has not disclosed the name of the appellants in his fardbeyan and the FIR was lodged against the unknown miscreants and subsequently the informant and the other witnesses, who happen to be family members of the informant have disclosed the name of the appellants in the occurrence on putting the name of the appellants in their mouth by some persons having grudge with the appellants. It is further submitted that as per the account of the informant, the accused persons had assaulted on his face by means of dagger and his face was stitched at three places and he was not able to speak comfortably, so how he has given such a graphic statement regarding the occurrence in the fardbeyan which also creates serious doubt about the prosecution case. It is also submitted that as per the witnesses account, the appellants were not put on TIP and they were identified by the witnesses for the first time in the court. It is also submitted that as per the prosecution case and witnesses account, the victims were assaulted by means of bamboo and dagger by the accused persons during the course of occurrence, but neither any injury report of the aforesaid victims has been brought on record nor



its author has been examined by the prosecution, so no offence under Section 397 of the IPC stands proved by the prosecution, and accordingly, the conviction of the appellants under Section 397 is not sustainable. It is further submitted that as per the prosecution case, the accused persons tossed the bomb at the place of occurrence during the course of occurrence and committed dacoity in the house of the informant by breaking open the door of the rooms, but I.O. has not been examined by the prosecution to bring on record the objective evidence of the case. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case against the appellants beyond all reasonable doubt by adducing trustworthy, convincing and reliable evidence. Hence, the impugned judgment and order of conviction and sentence passed against the appellants by the learned trial court is liable to be set aside and the appellants are entitled to be acquitted.

14. 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 prosecution case in toto and has identified the miscreants involved in the occurrence in the court and



other three witnesses, namely, PW-1, PW-4 and PW-6 have also corroborated the prosecution case and identified the appellants in the court and 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 these appeals are shorn of merit and are liable to be dismissed.

15. From perusal of record, it appears that to substantiate its case, the prosecution has examined six material witnesses in the case. Out of them, PW-2 Sukan Das and PW-3 Lal Bihari Das have turned hostile and PW-1 Ram Kumari Devi happens to be mother of the informant, PW-4 Dukha Pandit is the father of the informant, PW-5 Tej Narayan Pandit is the informant himself and PW-6 Mahendra Pandit is uncle of the informant.

16. From perusal of testimony of the aforesaid four witnesses, it appears that they have made an abortive bid to support the prosecution case by giving their statements before the court in consonance to the prosecution case, but from perusal of record, it appears that the occurrence is of midnight of 21.02.2009 at around 12:30 AM and PW-1 Ram Kumari Devi has stated in paragraph 2 of her cross-



examination that it was dark night at the time of occurrence. Likewise, informant PW-5 has stated in paragraph 15 of his cross-examination that it was dark night at the time of occurrence and the person standing in the vicinity could not be identified. Informant in his fardbeyan has stated that they had identified the accused persons in the torchlight and claimed to identify them again witnessing them but the informant PW-5 has stated in paragraph 26 of his cross-examination that two bulbs were litting by means of 12 vlt. battery at his house at the time of occurrence, but PW-1 Ram Kumari Devi, who happens to be mother of the informant and is one of the inmates of the house of the informant has not disclosed about witnessing of the appellants either in the torchlight or in the bulb light. She has also not disclosed about litting of the bulbs in her house at the time of occurrence while father of the informant, namely, Dukha Pandit PW-4, who also happens to be inmate of the house of the informant, has stated in paragraph 5 of his cross-examination that there was no light with him to identify the miscreants during the course of occurrence. The aforesaid contradictory statement of the informant as given by him in his fardbeyan and in the statement given before the court and that of other two



witnesses creates serious doubt about flashing of any torch or bulb at the place of occurrence at the time of occurrence enabling the informant and other witnesses to identify the appellants during the course of occurrence in such a dark night. Moreover, the aforesaid torch or the bulb has neither been seized by the I.O. nor produced before the court as material exhibit of the case. Thus, the prosecution has utterly and miserably failed to establish the source of identification and without any source of identification, it was not possible for the informant and other witnesses to identify the appellants in the occurrence in such a dark midnight.

17. From perusal of testimony of PW-1 Ram Kumari Devi, who happens to be mother of the informant, it appears that the appellants are her co-villager, that is why, she had identified them. But, in quite contradiction to the aforesaid statement of PW-1, the informant has stated in paragraph 8 of his cross-examination that Subhadra Sahni, Md. Alam, and Swarath Ram are residents of adjoining village Katai Tola while in paragraph 19 of his cross-examination, he has further stated that neither his co-villager nor anyone of his adjoining village were involved in the occurrence. Thus, the aforesaid contradictory statement of the said witnesses creates



serious doubt about the prosecution case and complicity of the appellants in the occurrence.

18. From perusal of testimony of the informant PW-5 and PW-6 Madhendra Pandit, it appears that the appellants were pre-acquaintance to them as the informant has stated in paragraph 3 of his examination-in-chief itself that he identified Subhadra Sahni, Swarath Ram, Sindheshwar Sahni and Md. Alam among the accused persons in the torchlight, who had kept him hold during the course of occurrence. In paragraph 24 of his cross-examination, he has further stated that besides Sidheshwar Sahni, he is acquainted with other appellants and in paragraph 8 of his cross-examination, he has also stated that Subhadra Sahni, Swarath Ram and Md. Alam are the residents of his adjoining village, namely, Katai Tola and PW-6 Mahendra Pandit, who happens to be uncle of the informant and had arrived at the place of occurrence at the time of occurrence and he was also caught hold by the appellants during the course of occurrence, has stated in paragraph 12 of his cross-examination that he always meet with the appellants, who are residents of his adjoining village. In paragraph 13 of his cross-examination, he has further stated that he always used to meet with Subhadra Sahni, Alam and



Swarath Ram preceding to the occurrence as they happen to be his adjoining villagers. As per the account of the informant and PW-6, they had identified the appellants in the occurrence and PW-6 Mahendra Pandit has further stated in paragraph 22 of his cross-examination that he had arrived at the place of occurrence at 12:30 AM and regressed to his house 10-15 minutes later and thereafter, he interacted with Taj Narayan Pandit after half an hour and disclosed the name of the appellants to them. In paragraph 23 of his cross-examination, he has further stated that they were pre-acquainted with the appellants, who had kept their face open at the time of occurrence. Thus, from perusal of the aforesaid statement of the witnesses, it is crystal clear that the appellants were known to the informant (PW-5) and Mahendra Pandit (PW-6) preceding to the occurrence and they had identified the appellants during the course of occurrence as they had kept their face open during the course of occurrence and moreover PW-6 Mahendra Pandit had disclosed the name of the appellants to the informant within an hour of the occurrence. From perusal of record, it appears that the fardbeyan was recorded after three and half an hour of the occurrence which means the informant had also come to know about the name of



the appellants from PW-6 preceding to giving fardbeyan to the police, but he has not disclosed the name of the appellants in the occurrence to the police at the time of giving his fardbeyan rather lodged the FIR against unknown miscreants which creates serious doubt about the prosecution case and complicity of the appellants in the occurrence.

19. From perusal of testimony of PW-4, PW-5 and PW-6, it appears that no TIP of the appellants was conducted by the police and the informant and aforesaid witnesses were not called for by the police to identify the appellants in TIP though the FIR was lodged against the unknown miscreants. As PW-4 Dukha Pandit has stated in paragraph 8 of his cross-examination that S.I. did not take him to the Jail for TIP of the accused persons. The informant PW-5 has stated in paragraph 12 of his cross-examination that police had not asked him to join the TIP and they never joined the TIP. Likewise, PW-6 Mahendra Pandit has stated in paragraph 11 of his cross-examination that he had not gone to jail to identify the accused persons after the occurrence. The informant and the aforesaid witnesses have identified the appellants for the first time in the dock. As as per the prosecution case, the appellants were unknown to the



informant and the witnesses as the FIR was lodged against the unknown miscreants and no TIP of the appellants has been conducted rather the appellants have been identified by the witnesses for the first time in the court, hence, aforesaid evidence of the witnesses regarding identification of the accused persons for the first time in the court is not acceptable.

20. Hon'ble Apex Court in *Anil Kumar @ Pintu Vs. State of Bihar (Now State of Jharkhand) reported in 2008(2) Crimes 139 (SC)* has been pleased to rule that in case where accused is not known to the witness, ordinarily, the identification of an accused for the first time in court should be corroborated by previous identification in the test identification parade. We do not find any extra-ordinary reason for accepting the evidence of the witness on the question of identification of the accused persons for the first time in court. This being the position, it is not possible to place reliance on the evidence of said witness. Hon'ble Apex Court in *Kapil Deo Mandal & Anr. Vs. State of Bihar reported in 2008 (16) SCC 99* has been pleased to rule that the incident happened at 11:00 O'clock in the night. The witnesses have stated that they have seen the incident and



recognized the appellants either in the torchlight or in the lantern-light which was burning at their house. It has come in evidence of the witnesses as well as the Investigating Officer that neither the torch or the lantern was seized by the I.O. during the course of investigation nor was it produced before the court. In the circumstances, it is difficult to believe that the appellants have been identified in the torchlight or in the lantern-light. Hence, in the aforesaid facts and circumstances of the case, it is not possible to place reliance on the evidence of said witnesses.

21. PW-1 Ram Kumari Devi has stated in paragraph 2 of her cross-examination that all the accused persons had not muffled their face. Informant PW-5 Tej Narayan Pandit in paragraph 3 of his examination-in-chief has stated that all the four accused persons, who had kept him hold were identified by him in the torchlight by their face which means that the appellants had not covered their face during the course of occurrence. Informant has further stated in paragraph 18 of his cross-examination that there were 15-20 accused persons in the occurrence. Out of them, some had covered their face while some kept their face open. PW-6 Mahendra Pandit has stated in paragraph 9 of his cross-



examination that all the four accused persons (appellants) had not covered their face at the time of occurrence. Aforesaid statement of the said witnesses eloquently indicates that the appellants had not covered their face at the time of occurrence. As per the witnesses account and as discussed by me in the earlier paragraph, the appellants were known to the informant and other witnesses preceding to the occurrence. As they had selected mid dark night to commit dacoity in the house of the informant and other persons to take advantage of the darkness, they would have taken utmost care to cover their face during the occurrence to avoid their identification during the course of occurrence and they would not have left their face unmuffled on the risk of their identification during the course of occurrence to face the rigor of conviction and sentence.

22. The informant PW-5 has stated in paragraph 16 of his cross-examination that the accused persons had given dagger blow on his cheek and his cheek was stitched at three places, so he could not speak out conveniently. But, from perusal of farbbeyan, it appears that informant has given graphic statement of the occurrence to the I.O. within three and half hours of the occurrence. As as per the account of the informant, he was given dagger blow in his cheek and his



cheek was stitched at three places and he could not speak out comfortably, then how he has given the graphic statement of the occurrence to the police within such a short span of time of the occurrence which creates serious doubt about the prosecution case.

23. PW-4 Dukha Pandit, who happens to be father of the informant has stated in paragraph 7 of his cross-examination that his son (informant) regained sense after four days of the occurrence and after regaining sense by him, he had interacted with him. The aforesaid statement of PW-4 eloquently indicates that on assaulting by the accused persons during the course of occurrence, the informant fell senseless and had regained sense after four days of the occurrence. But, from perusal of the fardbeyan of the informant, it appears that he had given fardbeyan to the police on the very date of occurrence within three and half hours of the said occurrence, so million dollar question arises as to when the informant was senseless for four days after the occurrence, then how he has given the fardbeyan to the police on the very date of occurrence and that too within three and half hours of the occurrence which creates serious doubt about the prosecution case and fardbeyan of the informant.



24. From perusal of farbeyan, it appears that besides the house of the informant, houses of four other persons, namely, Swarath Pandit, Ganga Dhar Pandit, Sukan Das and Lal Bihari Das were looted on the date of occurrence. Out of the aforesaid four persons only Sukan Das and Lal Bihari Das have been examined by the prosecution, who have turned hostile and rest two persons, namely, Swarath Pandit and Ganga Dhar Pandit have not been examined by the prosecution in substantiation of the prosecution case. Likewise, as per the fardbeyan, besides the informant, Ram Kumari Devi, Gulabiya Devi, Janarsi Devi, Mahendra Pandit and Sadhu Saran Das were injured during the course of occurrence at the hands of the accused persons, but out of the aforesaid victims, only informant, Ram Kumari Devi and Mahendra Pandit have been examined by the prosecution and rest aforesaid three victims have not been examined by the prosecution and no plausible and convincing reason has been assigned by the prosecution for non-examination of the aforesaid two owners of the house whose houses were looted at the time of occurrence by the accused persons and three victims, who were assaulted by the accused persons during the course of occurrence. Hence, adverse inference is drawn



against the prosecution and it also creates serious doubt about the prosecution case.

25. From perusal of fardbeyan, it appears that the accused persons had assaulted the informant and other five victims by means of bamboo during the course of occurrence and as per the account of PW-1 Ram Kumari Devi and that of the informant, the informant was assaulted by means of dagger by the accused persons during the course of occurrence, but neither injury report of any victim has been brought on record nor the doctor has been examined by the prosecution, hence, sustaining injury by the informant and other victims at the hand of the accused persons during course of occurrence does not stand established by the prosecution, so no conviction under Section 397 IPC can be made for want of injury sustained by the victims during the course of occurrence.

26. As per the prosecution case as adumbrated in the fardbeyan, the accused persons tossed the bomb at the place of occurrence during the course of occurrence and committed dacoity in the house of the informant by breaking open the door of the rooms and box, but no objective evidence has been brought on record by the prosecution by examining the I.O. which also creates serious doubt about the prosecution



case.

27. From perusal of witnesses account, it appears that no incriminating article has been recovered from the possession of the appellants rather as per the account of the informant as given in paragraph 25 of his cross-examination, the box and attachy looted from his house were found dumped at the Kathaili Asthan located near the village Katai.

28. In the aforesaid facts and circumstances of the case, I find and hold that the prosecution has utterly and miserably failed to substantiate the prosecution case and complicity of the appellants in the occurrence by adducing convincing, cogent, consistent and worth credence evidence. Hence, the impugned judgment and order of conviction and sentence passed by learned trial court against the appellants is set aside and the appellants are acquitted of all the charges levelled against them giving them benefit of doubt. As the appellants are on bail, they are discharged from the liability of the bail bonds. Accordingly, the aforesaid two Criminal Appeals stand allowed.

29. Let a copy of the first and last page of this judgment be handed over to the learned *amicus curiae*, Mr. Prince Kumar Mishra, learned *amicus curiae* be paid



prescribed fee by the Patna High Court Legal Services
Committee.

rohit/- **(Prakash Chandra Jaiswal, J)**

AFR/NAFR	AFR
CAV DATE	N.A.
Uploading Date	28-11-2018
Transmission Date	28-11-2018

