

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.130 of 2009

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Aklu Sahani, son of Kheman Sahani, resident of village- Chhap, P.S.-Paroo,
District-Muzaffarpur. Appellant/s

Versus

The State of Bihar Respondent/s

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Appearance :

For the Appellant/s : Mr. Shashi Bhushan Singh

For the Respondent/s : Mr. Parmeshwar Mehta, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 26-11-2018

1. Appellant, Aklu Sahani has been found guilty for an offence punishable under Section 395 IPC and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.5000/- and in default thereof, to undergo S.I. for six months, additionally, vide judgment of conviction and order of sentence dated 23.01.2009 passed by the Additional Sessions Judge, FTC, IV, Muzaffarpur in Sessions Trial No.402/2005.

From the record, it transpires that it happens to be separate record on account of absence of appellant at an initial stage.

2. Ram Bharosh Singh (PW.4) gave his fardbeyan on 29.05.2003 at about 02:00 AM at his house before police officials of Paru Police Station disclosing therein that at about 11:00 PM on 28.05.2003 while he along with his wife Parmila Devi, son Chandan Kumar Kashyap, daughter Sweta Bharti was sleeping over roof of his house, at about 11:30 PM he heard sound of breaking of main door of his house whereupon, he woke up and began to see. During course thereof, he has seen five miscreants who came over roof



through stair, cordon them and then, they all pointed out pistol and directed them to sit idle otherwise, will be murdered. They took away ear ring, payal, ring from his wife. Then thereafter, three dacoits out of five, got down while two watched over them. They joined with other dacoits who indulged in breaking of lock, boxes and, succeeded taking away utensils, cloth, cash, ornaments including other belongings. He identified two amongst the dacoits as Aklu Sahni (appellant) as well as Basist Sahni. With regard to rest, claimed identification. They have also fired during course of fleeing.

3. On the basis of the aforesaid fardbeyan, Paroo P.S. Case No.93/2003 was registered proceeded with an investigation as well as submission of charge sheet against four accused persons namely Basist Sahni, Shiv Sahni, Tuntun Sahni, Chabila Sahni for an offence punishable under Section 395 of the IPC keeping investigation pending against others including the appellants. Subsequently thereof, appellant was apprehended and then, charge sheet agaisnt him has been submitted facilitating the trial meeting with the ultimate result, subject matter of instant appeal.

4. 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 appellant/accused was labourer under the prosecution party and as,



he left to do on account thereof, he has been falsely implicated. However, nothing has been adduced on his behalf.

5. In order to substantiate its case, prosecution has examined altogether four Pws who are Ram Kumari Devi (PW.1), Parmila Devi (PW.2), Ram Sahay Singh (PW.3), Ram Bharosh Singh (informant). Side by side has also exhibited, photocopy of the fardbeyan as Ext.1. As stated, nothing has been adduced in defence.

6. Learned counsel for the appellant while challenging the finding recorded by the learned lower court has submitted that the judgment of conviction and sentence happens to be non-sustainable in the eye of law on account of non-appreciation of the materials available on the record, in its right perspective. In order to justify the same, it has been submitted that there happens to be no controversy appellant being the co-villager. Had there been his complicity in the alleged occurrence then, in that circumstance, the appellant would have at least tried to conceal his face so that his identification could not be possible. None of the witnesses have stated that he was concealing his face during course of dacoity. This happens to be a circumstance which speaks a lot with regard to genuineness of the prosecution so far, identification is concerned. Furthermore, it has also been submitted that being co-villager and having his house at a distance of ten *laggi* as stated by PW.3, inmates of the house might have been in a position to identify him but, PW.1 as well as PW.2



have not identified. Not only this, they even disown to claim identification by way of residing from their earlier statement whereupon, at the instance of prosecution were declared hostile. Furthermore, it has also been submitted that manner where under PW.3, claimed identification became untrustworthy as, having absence of source of identification, it was impossible to identify from behind that too from a considerable distance. Now remains the evidence of PW.4 the informant which in the facts and circumstance of the case, could not be relied upon. Even in worst case, being co-villager having every possibility of being fallen victim of personal grudge and vendetta out of village politics, should be given a benefit of doubt and that being so, appeal be allowed. Also submitted that non-examination of I.O. happens to be additional ground as it caused prejudice to the appellant.

7. The learned Additional Public Prosecutor controverting the submission having made on behalf of appellant has submitted that soon after the occurrence, during course of recording fardbeyan informant had disclosed names of two accused persons to be identified by them namely Aklu (appellant) as well as Basist amongst the dacoits. So, there could not be any opportunity to hatch up in order to falsely implicate. That being so, the presence of appellant being one of the dacoits is found properly substantiated. Furthermore, it has also been submitted that even during course of



trial PW.3 and PW.4 have consistently shown presence of appellant to be one of the dacoits and that being so, there happens to be proper identification more particularly in the background of the fact that there happens to be no cross-examination at the end of the appellant whether he had taken any kind of precaution to conceal his identity. Even then, PW.4 had identified the appellant to be one of the dacoits who had kept the informant confined on the pretext of firearm.

8. Furthermore, it has also been submitted that conduct of the appellant is found admissible in accordance with section 8 of the Evidence Act as, soon after the occurrence he escaped from the village and remained outside for years together till the date he was apprehended by the police. Charge sheet has been submitted after his apprehension in the year 2005. So, the cumulative effect did not justify the submission having raised on behalf of appellant that he has been victim of personal grudge and vendetta. It has also been urged that on account of absence of contradiction, exaggeration in the evidence of PWs and further, the factum of dacoity at the end of the appellant, has not been challenged the non-examination of the I.O. is not at all found prejudicial to the interest of the appellant. Consequent thereupon, the finding recorded by the learned lower court is fit to be confirmed.

9. From the lower court record, it is evident that two inmates, PW.1 Ram Kumari Devi and PW.2 Parmila Devi have not



supported the case of the prosecution so far identification of appellant amongst dacoits is concerned. However, they have substantiated the factum of dacoity having been committed in their house on the alleged date and time of occurrence. During cross-examination, there happens to be no challenge at the end of the appellant so far commission of dacoity is concerned.

10. PW.3 is the brother of the informant, PW.4. He had deposed that his brother Ram Bharosha Singh is the informant of this case. The occurrence is of dated 28.05.2003 at about 11:30 PM. At that very time, he was sleeping over roof of his Baithka near his house. Dacoits came and began to break the door whereupon, he woke up. He rushed with torch. He made query over which, dacoits have threatened him and said to disperse otherwise he will be killed. On this, he became afraid of and then, revert back. He began to raise alarm over which, villagers assembled seeing whom, some of the dacoits began to fire. Dacoits left the place after looting away their belongings. Dacoits were about fifteen in number. When villagers assembled, dacoits began to flee. He had identified two dacoits amongst them who were Aklu Sahni and Basist Sahni. He had identified the Aklu in dock. During cross-examination at para-5 he had stated that he has five brothers and are joint. In para-6 he had stated that Aklu is his co-villager. His house lies ten laggi away from his house. He had denied the suggestion that Aklu was labourer



under them but, had admitted that his father occasionally used to work as Gharami. In para-9 he had stated that on the fateful day he was sleeping along with two kid. He rushed from the roof of Baithka and came near his house. Seeing the dacoits, raised alarm attracting 100-150 people seeing whom, dacoits escaped. They have chased up to 15-20 laggi during course thereof, there was difference of 30-40 laggi. Dacaoits have had concealed their face. He had denied the suggestion that as Aklu left to do his work on account thereof, he has been implicated in this case.

11. PW.4 is the informant. He had deposed that on 28.05.2003 at about 11:30 PM dacoity was committed in his house. At that very time he was sleeping over roof of his house along with his family members. He woke after hearing sound of breaking of main door of his house. Then thereafter dacoits intruded inside his house out of whom, five dacoits came over roof through stair and cordon them and then, pointed out pistol and asked them to keep mum otherwise, will be murdered. He had further stated that he had identified Basist Sahni, Sheo Sahni, Kumkum Sahni and Aklu Sahni amongst them. Then had stated that the dacoit whom he had not identified took away chain, ring, from his wife. Then thereafter, three dacoits got down who joined the other dacoits and then, looted away his belongings, cash, utencils etc. Then thereafter, dacoits escaped therefrom. Police came whom he gave his fardbeyan. Identified his



signature. Identified the accused in dock. During cross-examination at para-8 he had stated that Aklu Sahni is his villager. His house lies 1000 feet away from his house. He is a labour. In para-9 he had denied the suggestion that accused happens to be his labourer since before and as he left to do menial work on account thereof, he has been falsely implicated. In para-11 he had stated that all the persons having their houses in the surrounding were sleeping. When dacoits began to fire then they woke up and raised alarm daku-daku. In para-12 he had stated that dacoits was committed for twenty five minute. Dacoits have not fired at any body. He had further stated that five dacoits came near him out of whom, some having open face while some had concealed the face. In para-13 he had stated that two dacoits remained over the roof till the time dacoits escaped from his house Dacoits have also threatened to kill on account thereof, they remained sitting for quite long time. In para-14 he had stated that dacoits escaped towards eastern side. None had chased them. In para-15 he had stated that whatever been disclosed at the present moment is correct and whatever been disclosed at an earlier occasion is also correct. Then had denied the suggestion that he has falsely implicated Aklu Sahani as, he left to do menial work under him.

12. Non-examination of I.O. did not be seen as deficiency in the prosecution case in universal way unless and until there happens to be infirmity persisting in the prosecution case in a form



of inconsistency amongst the witnesses with regard to manner of occurrence, material a exaggeration in the evidence of the PWs, proper identification of the place of occurrence. So, the non-examination of I.O. in routine manner could not be accepted as a dent in the prosecution case.

13. In Baldev Singh v. State of Haryana reported in 2016 Cr.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.”

14. From the evidence available on the record, it is evident that there happens to be no exaggeration or contradiction in the evidence of PW.1, PW.2, PW.3, PW.4 nor, there happens to be any kind of inconsistency with regard to commission of the dacoity in their house.

15. PW.1 and PW.2 who are inmates of the house have not supported the case of the prosecution with regard to identification of



the appellant in dock whereupon, they were declared hostile, so non-examination of the I.O. really caused prejudice to the prosecution and not the defence. Now coming to the evidence of PW.3 and PW.4, it is apparent that during course of cross-examination, in spite of the fact that PW.3 had claimed to have rushed from roof of the Baithka where he was sleeping, with torch and so, there would have been proper, cross-examination at the end of the appellant over mode of identification. Furthermore, he had spoken that some of the dacoits have concealed their face, at least, on that very score he would have been tested whether appellant had concealed his face or not. Moreover, being co-villager, the proper mode of identification through other activity that means to say from gait, apperance was very much possible. In likewise manner, while the PW.4, informant had stated in clear tone that five dacoits have come over roof, pointed out pistol and forced them to sit idle otherwise they will be murdered out of whom, he claimed identification of four accused and so far appellant is concerned it has been stated that he had encircled him he was the person who had aimed at him from front side but, during cross-examination, aforesaid theme has not been tested. That means to say, this part of evidence remained unrebutted.

16. In order to discredit any part of evidence of PW, adversary is required to test the same by way of cross-examination.



17. In *Gian Chand & others v. State of Haryana* reported in *2013(4) PLJR 7 (SC)*, it has been held:

11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in *Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors.*, AIR 2013 SC 1204 observing as under:

“31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.”

(Emphasis supplied)”



18. That being so, there happens to be identification by name and further, corroborated during course of trial by way of identifying him in dock is a material fact that / goes against the appellant. In spite of the fact that PW.1 and PW.2 have stated that they have not identified any of the dacoit. However, they all are consistent over factum of dacoity.

19. Section 8 of the Evidence Act duly acknowledges the subsequent conduct of an accused though weak in nature in case is independently taken up but when the same is taken together with the other material then in that circumstance, will play an important role.

20. From the record, it is evident that soon after the occurrence, appellant/accused disappeared whereupon trial was separated. When the aforesaid theme is taken together with the evidence so adduced on behalf of prosecution, the factum of dacoity as well as proper identification of appellant as one of the dacoits is found duly established. Consequent thereupon, the finding of the learned lower court with regard thereto is confirmed. So far sentence part is concerned, from the order that it transpires that appellant has been apprehended and produced on 08.09.2004 and he remained under custody during the trial and was granted bail on 13.04.2009 under the present appeal. That means to say, he remained under custody for four and half years approximately having no criminal antecedent whereupon, the sentence so inflicted by the learned lower



court is modified as sentence already undergone. With the modification in sentence, appeal is dismissed. Appellant is on bail, hence is being discharged from its liability.

(Aditya Kumar Trivedi, J)

Prakash Narayan

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	07.12.2018
Transmission Date	07.12.2018

