

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.77 of 2009

Arising Out of PS.Case No. -37 Year- 2002 Thana –Buxar (Industrial) District- BUXAR

=====

Munna Nut son of Ramashankar Nut R/O Village-Amghat, PS-Basdih Road, Distt-Balia (UP).

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Baban Roy, Amicus Curiae

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

=====

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 03-10-2018

On repeated calls, learned counsel for the appellant did not turn up, on account thereof, Sri Baban Roy, Advocate has been requested to assist the court as an Amicus Curiae.

2. Vide judgment of conviction and order of sentence dated 07.01.2009, appellant, Munna Nut has been found guilty for an offence punishable under Section 395 IPC and sentenced to undergo RI for 10 years as well as to pay fine of Rs. 3000/- in default thereof, to undergo SI for 9 months additionally by FTC-II, Buxar in Sessions Trial No. 229/2003.

3. Hare Ram Mali (PW 3) gave his *Fard-e-beyan* on 05.09.2002 in an injured condition divulging the fact that in the preceding night while all the family members were sleeping, dacoits armed variously intruded his house and began to loot. During course of resistance, one of the dacoits gave *Chhura* blow causing injury



over left side of chest. His nephew was also assaulted. Then thereafter, the dacoits looted away their belongings. Then had disclosed the physical features of the dacoits who were in vest and *lungi* having their face open and were using mixed dialect of Bhojpuri and Hindi. Furthermore, claimed identification of the dacoits.

4. On the basis of aforesaid Fard-e-beyan, Buxar (Industrial) PS Case No.32/2002 was registered against unknown. As is evident, two suspects namely, Govardhan Ram and Harishankar Ram were arrested and as per their discloser some of the looted articles, broken box were recovered from a maize field and for that, seizure list was prepared. They also made inculpatory extra-judicial confessional statement whereunder disclosed one Titil Nut to be the ring leader and further, he procured presence of other dacoits, one of the same is the appellant, Munna Nut. They were also apprehended and from their possession articles as disclosed in the seizure list were recovered which were put on TIP and were identified. However, none of the dacoits was identified during TIP.

5. After concluding investigation, charge-sheet was submitted against them out of whom, presence of appellant could be secured only being under custody whereupon, trial was separated, proceeded, meeting with ultimate result, subject matter of instant appeal.



6. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial. However, neither oral nor documentary evidence has been adduced in defence.

7. In order to substantiate its case prosecution had examined altogether five PWs who are PW-1, Sarswati Devi, PW-2, Munni Devi, PW-3, Hare Ram Mali, PW-4, Kameshwar Sharma and PW-5, Vinay Kumar Sharma as well as had also exhibited Ext-1, 1/2, 1/3, 1/4, Signatures over TIP, Ext- 1/5, Signature over Fard-e-beyan, Ext-2, 3 & 1/1, Fard-e-beyan, Ext-4, Case diary. As stated above, nothing has been adduced in defence.

8. Learned Amicus Curiae while assailing the judgment impugned has submitted that the finding recorded by the learned lower court is not at all legally sustainable whereupon, is fit to be set aside. In order to substantiate the same, it has been submitted that appellant was put on TIP at an earlier occasion but was not identified. Therefore, his identification as claimed by PWs during course of evidence, should be seen with suspected eye and unless and until, there happens to be cogent explanation at the end of the prosecution witnesses with regard to non identification of the appellant at an initial stage, the same could not be legally permissible. Brushing aside the same, nothing more remains and so, the finding of



the learned lower court on that very score, is fit to be set aside.

9. Learned APP while supporting the finding recorded by the learned lower court has submitted that non identification of accused during course of TIP is not a valid ground to reject identification of same accused in court as, the identification in court is a substantive evidence. Furthermore, it has also been submitted that none of the witnesses has been suggested that out of malice, grudge or at the instance of Investigating Officer or on some other reason he has been identified. That being so, the judgment impugned attracts no interference.

10. From the record, it is evident that learned APP was very much ignorant and in likewise manner, the learned P.O. had also sailed with instant trial leisurely as a result of which, irrespective of the fact that even having presence of sufficient materials, the prosecution has sailed in cryptic, defective manner. From the materials available on the record, it is apparent that on an inculpatory extra-judicial confessional statement of Govardhan Ram and Harishankar Ram who had also pointed out the place where distribution of article as made, recovery of so many articles including broken box at their instance apart therefrom, name of appellant including Titil Nut and others were also exposed. From the seizure list, it is evident that from the possession of Munna Nut, appellant



articles so enlisted therein were recovered and were identified during course of TIP but has not been exhibited over those articles, were produced during trial. Charge-sheet has been submitted under 395, 397 and 412 IPC but, charge has been framed under Section 395 IPC irrespective of the fact that there happens to be disclosure at the end of the informant as well as other witnesses that the dacoits, as were resisted, caused injury over chest of informant by means of *Chhura* as well as his nephew was also assaulted. The other devastating feature as coming out therefrom is in an alternative charge under Section 412 IPC has been framed which the judgment impugned also suggests. During course of trial irrespective of examination of PW-5, the Investigating Officer, neither APP nor learned P.O. cared to have relevant documents exhibited in accordance with law though PW-5 had deposed with regard to recovery. Seizure list happens to be available on the record. The articles which the prosecution party had received with an undertaking, was not at all directed to produce the same and the officer, who conducted the TIP also could not be examined and in the aforesaid background, as is evident from judgment impugned, appellant has been acquitted for an offence punishable under Section 412 IPC.

11. Now coming to propriety of the judgment whereby appellant has been convicted under Section 395 IPC. It is



apparent that all the material witnesses i.e. PWs No. 1, 2, and 3 have identified the appellant in court which has been accepted by the learned lower court. That being so, the appellant has been identified to be one of the members of the dacoits during course of commission of dacoity in the house of PWs-1, 2 and 3 convicted and sentenced, subject matter of challenge under the present appeal.

12. It is needless to say that under Code of Criminal Procedure, there happens to be no provision for conduction of TIP. It happens to be an effort as guided under the Police Manual in order to ascertain whether the direction of the investigation is going in proper way. That happens to be the reason behind that the theme of TIP is not at all admissible till it is being corroborated by the witnesses during course of evidence before the court, as the same happens to be the substantive evidence and the intervening event during course of investigation is a circumstance guided in accordance with Section 145 of the Evidence Act as well as 154 of the Evidence Act, as the case may be.

13. From perusal of the evidence of PWs-1, 2, and 3, it is evident that they have corroborated the prosecution case with regard to commission of dacoity by the unknown dacoits and during course thereof, they have also corroborated assault over the person of PW-3, by means of *Chhura*. They have claimed identification of the



appellant in dock and so, the substantive evidence is found against the appellant. That means to say, appellant has been identified by the three witnesses. In the aforesaid background, now it has to be seen whether their testimonies are fit to be relied upon?

14. PW-1 is the mother of informant, PW-3. During examination-in-chief, she had stated that she would not identify the dacoits. She had not identified the dacoits during course of TIP. She had claimed identification of two accused present in the dock as a members of the dacoits. There happens to be remark of the court at that juncture that she had also identified the accused relating to other cases. During cross-examination at para-4, she had stated that she had not identified anybody during course of TIP but, she had identified the dacoits during course of commission of the dacoits.

15. PW-2 who happens to be *Bhabhi* of the informant, had deposed during examination-in-chief that she had not participated during course of TIP but, she was called at police station where identified the accused who was in the lock up. During cross-examination at para-4, she had stated that police took her to police station and shown the accused to be one of the dacoits. She had further stated that she had not seen the accused since before.

16. PW-3 is the informant who during course of examination-in-chief had stated that one of the dacoits is present in



the dock and identified him apart from divulging the commission of dacoity in his house. In the same breath, he had stated that this accused was also shown to him at police station. During cross-examination at para-3, he had stated that during course of TIP, he had not identified as he became very much nervous.

17. PW-4 is the formal witness. PW-5 is the Investigating Officer. From the order-sheet, it is evident that learned lower court without filling up his name, parentage, address recorded his deposition and on 06.09.2004. After lapse of 4 years, the aforesaid defect was traced out and then thereafter, vide order dated 22.12.2008, name of Investigating Officer, Vinay Kumar Sharma has been scribed leaving the other blank format unfilled.

18. Investigating Officer, during course of his examination-in-chief has stated that after getting confidential information regarding commission of dacoity, he rushed to the spot and seeing the informant in critical condition, removed him along with others to the hospital in order to save his life. On the other hand, he along with other police personnel had gone in the direction in which the dacoits had gone but could not detect. They returned back to the hospital, recorded *Fard-e-beyan* of the informant. Then thereafter, proceeded with investigation, inspected the place of occurrence, which happens to be the house of the informant (detailed



topography of the place of occurrence), found two persons, namely, Govardhan Ram and Harishankar Ram in suspected condition who were apprehended and on interrogation, they made inculpatory extra-judicial confessional statement. As they pointed out, certain articles, broken box etc were recovered from a maize field for which seizure list was prepared. On the basis of inculpatory extra-judicial confessional statement, Munna Nut was apprehended and on his pointing out, booty was recovered for which seizure list was prepared. Then thereafter, Titil Nut was apprehended and on his pointing out, the booty was recovered. They were put on TIP. Articles recovered from their possession were also put on TIP, accused were not identified but articles were identified. Then thereafter, those articles were returned back to the informant as per order. Then submitted charge-sheet. During cross-examination, as is evident from para-5, he had stated that no specific identification mark was put over article having recovered on the pointing out of Munna Nut. However, from his evidence, it is evident that prosecution had not cared to explain the discloser made by PW-2 as well as PW-3 that the appellant was shown to them at the police station. That being so, there happens to be no denial at the end of the prosecution that the appellant was shown to the PWs at the police station since before.

19. As stated above, TIP is not a substantive piece



of evidence rather identification in court happens to be the substantive piece of evidence as well as admissible in the eye of law but, when the witnesses have got an opportunity to see the accused at the police station before conduction of TIP and then, they failed to identify the accused during course of TIP, is a circumstance to be taken into consideration, more particularly, in the background of the fact that after more than two years of the occurrence, the witnesses came up in dock for their evidences and then had claimed identification of the appellant. In the aforesaid background, the appellant is found to be entitled for benefit of doubt. Consequent thereupon, the judgment impugned is set aside. Appeal is allowed.

20. Since appellant is on bail, he is discharged from the liability of his bail bond.

21. The first and last pages of the instant judgment be handed over to the learned Amicus Curiae.

(Aditya Kumar Trivedi, J)

perwez

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	06/10/2018
Transmission Date	06/10/2018

