

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.276 of 2009

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SOHAN MUSAHAR, SON OF LATE MAHAGU MUSAHAR, RESIDENT
OF VILLAGE-DUMARAITH, POLICE STATION-BHABUA, DISTRICT-
KAIMUR AT BHABUA.

... .. Appellant/s

Versus

THE STATE OF BIHAR

... .. Respondent/s

=====

with

Criminal Appeal (SJ) No. 277 of 2009

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1. Ramjee Musahar, son of Late Kekadh Musahar.
2. Doma Musahar, son of Late Bishuni Musahar.
Both residents of village Dumaraith, Police Station-Bhabua, District-
Kaimur at Bhabua.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

(In Criminal Appeal (SJ) No. 276 of 2009)

For the Appellant/s : Mr. Arun Kumar Tripathi, Amicus Curiae

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

(In Criminal Appeal (SJ) No. 277 of 2009)

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

For the Respondent/s : Mr. Binod Bihari Singh

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 21-12-2018

1. On repeated calls, none appears on behalf of
respective appellants, on account thereof, Sri Arun Kumar Tripathi
and Sri Baban Roy, learned Advocates have been requested to
assist the Court as an Amicus Curiae.

2. Cr. Appeal (S.J.) No.276 of 2009, wherein
Sohan Musahar is the appellant and Cr. Appeal (S.J.) No.277 of
2009, wherein Ram Jee Musahar and Doma Musahar are the
appellants, arise out against common judgment of conviction



dated 02.03.2009 and order of sentence dated 09.03.2009 passed by the 1st Additional Sessions Judge, Kaimur at Bhabhua in Sessions Trial No.66 of 2009/ 12 of 2009, whereby and whereunder they all 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.50,000/- and in default thereof, to undergo R.I. for two years, additionally, been heard together and are being disposed of by a common judgment.

3. Manoj Kumar Kharwar (PW-3) gave his fard-bayan on 08.01.1997, disclosing therein that in the preceding night while he along with his father-in-law and brother-in-law were sleeping in a thatched house having over the roof of his house, armed dacoits came, overpowered them on the point of firearms and then, tied hands and legs of all the persons. Then thereafter, took him down stair to facilitate opening of rooms and then, opened the main door facilitating appearance of 10-12 dacoits, who committed dacoity in his house and taken away all the belongings, ornaments, utensils and for that, F.I.R. against unknown was registered bearing Bhabua P. S. Case No.6 of 1997, wherein he claimed identification of the dacoits, whom they have seen in torch light having flashed by them.



4. It is further evident that during course of investigation, so many culprits were apprehended, who were put on T. I. Parade, identified and against some of them, the chargesheet has been submitted keeping investigation pending against others and that happens to be basis for conduction of trial against these appellants, who met with ultimate consequence, subject of adjudication under these appeals.

5. 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 further been pleaded that as PW-1, father-in-law of informant has political influence over the police, got the appellants apprehended and then, got them identified on false pretext of being dacoits. Moreover, nothing has been adduced in defence.

6. In order to substantiate its case, altogether 13 PWs (serial no.10 has wrongly been numbered as 11), who are PW-1, Sadan Kharwar, PW-2, Om Shankar Bidhyarthi, PW-3, Manoj Kumar Kharwar, PW-4, Maya Devi, PW-5, Chanda Devi, PW-6, Muya Devi, PW-7, Lalita Prasad, PW-8, Ram Karan Singh, PW-9, Ashok Kharwar, PW-10, Subhash Bind, PW-11, Sonbarti Devi, PW-12, Vimla Devi and PW-13, Surya Bansh Kharwar as well as also produced documents as Exhibit-1, signature of



infomant over fard-bayan, Exhibit-1/1, endorsement over fard-bayan, Exhibit-2 is the formal F.I.R. As stated above, nothing has been adduced on behalf of defence.

7. Learned Amicus Curiae while assailing the judgment of conviction and sentence has submitted that the finding having been recorded by the learned lower court is not at all sustainable in the eye of law as the same suffers from inherent lacunae. In order to substantiate the same, it has been submitted that F.I.R. was registered against unknown. Appellants were apprehended and remanded to the judicial custody. From his first day of remand to the date of T.I. Parade that means to say, on 17.03.1997, appellants have so many times come up before Civil Court for extension of period of judicial custody without any precaution, whereupon became volunerable and so, there was every occasion of access at the end of the prosecution and that happens to be reason behind, identification by PW-1 and PW-2. PW-2 is the son of PW-1. PW-1 was Up-Pramukh of the locality, having political influence and so, apprehension as well as identification of appellants happen to be under the political colour. Furthermore, it has also been submitted that nothing has been recovered from their posssession, whereupon the complicity of appellants during course of alleged offence of dacoity has become



blink. In its continuity, it has also been submitted that I.O. has not been examined, Magistrate has not been examined, on account thereof, propriety of the T. I. Parade could not be tested and in likewise manner, appellants have been deprived of an opportunity to place before the Court regarding illegal activity of the I.O., who coming under political influence of PW-1, Up-Pramukh got the appellants involved in this case and further, by showing them to PW-1 as well as PW-2 before conduction of T. I. Parade. Therefore, identification of the appellants during the T. I. Parade as well as in the dock has got no relevance in the eye of law and further, could not be accepted, admitted, acknowledged in accordance with law.

8. It has also been submitted that the aforesaid activity is found furthermore exposed from the conduct of the I.O. itself, who had only produced PW-1 and PW-2 only for the purpose of T. I. Parade irrespective of the fact that their presence at the P.O., sasural of his daughter was by chance and further, the house owner informant (PW-3), who claimed identification of the dacoits, the other family members, who also claimed identification of the dacoits were not at all allowed to participate during T. I. Parade, whereupon irrespective of factum of dacoity, that could not be considered a favourable situation in favour of the



prosecution. Accordingly, judgment of conviction and sentence recorded by the learned lower Court happens to be fit to be set aside.

9. On the other hand, learned Additional Public Prosecutor while refuting the submission has submitted that it is not to be correct legal interpretation that on account of non-examination of particular witness, the prosecution case be brushed aside rather it happens to be settled principle of law that the Court has to see from the evidences having adduced at the end of the prosecution during course of trial, whether it is sufficient to record finding to the effect that prosecution has succeeded in substantiating its case.

10. It has further been argued that factum of dacoity goes out of controversy. It is true that I.O. and Magistrate have not been examined, but that will not give any adverse impact over admissibility of evidence of PW-1 and PW-2, who claimed that they have identified these accused persons during course of T.I. Parade and further, corroborated the same by identifying them in dock. No cross-examination has been made challenging the mode of T. I. Parade nor it has been suggested that they were shown to the witnesses prior to conduction of T. I. Parade and so far suggestion whatever been given at the end of the appellants



that they were shown to the witnesses after arrest gone futile. On that very score, there should have been positive, conclusive evidence or a case of probability would have been placed at the end of the appellants in order to defuse the impact of T. I. Parade, but the appellants failed on that very score. So, the finding so recorded by the learned lower Court is fit to be confirmed.

11. It is evident from the record that PW-7 and PW-8 are formal witnesses. PW-10, wrongly numbered as serial no.11, stood a witness against identification of recovered article. So far PW-3, PW-4, PW-5, PW-6, PW-9, PW-11 and PW-12, they all deposed over the factum of dacoity. None of them claimed identification against any of the appellants nor they were called upon during investigation to participate in T. I. Parade. Appellants have been identified by PW-1 and PW-2 and so, their evidences are to be properly scrutinized in order to test their veracity. Before that, one should borne in mind that neither I.O. nor Magistrate has been examined nor there happens to be explanation. In likewise manner, TI chart has also not been made on exhibit of the record.

12. PW.1 has stated that on the alleged date and time of occurrence, he was at the place of his daughter Chanda along with his son Om Shankar Vidyadarthi (PW.2). While they were sleeping on the fateful night along with his son-in-law Manoj



Kumar Kharwar (informant), the dacoits raided the house. 4-5 dacoits came over roof, and on the pretext of firearm, they tied their hands and legs. At that very time, lantern was burning. The dacoits were also flashing torch. He claimed identification of the dacoits. Then there happens to be elaborate details regarding commission of dacoity dacoits succeeded in taking away all the belongings. Then has stated that dacoits were more than fifteen in number. He has further stated that there was conduction of TIP wherein he participated. His son had also participated. He identified three dacoits whom he identified in the dock also. He has further stated that TIP was conducted by the Magistrate. He had also participated during course of identification of the recovered article but he could not identify. During course of cross-examination at para-4 it happens to be with regard to details of the location of surrounding. In para-5 he has stated that three persons were sleeping in a hut over roof of the house having quilt over them. Lantern was burning. First of all, he woke up and then he awoke his son, son-in-law and said that there happens to be sound of barking. While they were perceiving the same during midst thereof dacoits came. Just after coming, the dacoits have not flashed torch over them. Three dacoits arrived near them conjointly. They tried to off the lantern but, as they were in hurry



so, could not get the switch whereupon, it took some time and during course thereof, he had seen face of the dacoits. In para-6 he has stated that they have not tried to apprehend the dacoits because of the fact that they were armed. Then has disclosed that after tying their leg and hand, they flashed torch. Thereafter, he detailed the activity. Then, dacoits taken away his son-in-law to ground floor after untying his hands and leg. Firstly, three dacoits were near them. Then, two dacoits got down leaving one who kept watch till the last. He had not seen any of the dacoits before the occurrence. Then there happens to be cross-examination with regard to subsequent activity. Further he stated that within 3-4 days after the occurrence he got information that some dacoits have been apprehended. Then he said that he could not say when the dacoits whom he identified, were apprehended. Even after some interval, he again got information regarding apprehension of some dacoits. He used to get information from Superintendent of Police but, during course thereof, Superintendent of Police had not disclosed to him where raid was to be conducted. In para-8 he has stated that some Chowkidar had informed that they have to participate in TIP. The day on which, he was to participate in TIP met with the aforesaid chowkidar who took him inside the jail. His son had accompanied him. He along with his son was taken inside



the jail. When he gone inside, in between 40-70 under trial prisoners were in queue and out of them, he identified three persons. Magistrate was there. None of the police officials were there. He has further stated that before conduction of TIP, police had recorded his statement. In para-9 he has stated that occurrence was committed in the month of January while he had participated in TIP in the month of March. He has further denied the suggestion that the persons whom he identified were shown to him by the police officials at the police station after their arrest, before conduction of the TIP. He denied the suggestion that he identified the accused as directed by the police. He denied the suggestion that he had not seen the accused persons as one of the member of the dacoit. He denied the suggestion that accused persons were not a member of the dacoits.

13. PW.2 is his son. During examination-in-chief he has reiterated the version as stated by the PW.1, his father. Furthermore, he has stated that he had participated during course of TIP and identified one dacoit. TIP was conducted by the Magistrate. Further, the witness has identified one person who disclosed his name as Ramji Mushar whom he stated that he identified him during course of TIP also who was actively involved during course of dacoity. During course of cross-



examination, he has stated that his father is Deputy Pramukh but he is not knowing whether he is associated with any party. He has further stated that at the time of occurrence his father was not Deputy Pramukh. He has further stated that he does not know permanent residence of the accused whom he identified. Then there happens to be cross-examination over the occurrence. In para-3 he has further stated that Chowkidar had informed after two months of the occurrence to participate in TIP. He has further stated that he had not accompanied the I.O. or the Chowkidar rather he came along with his father. In para-4 he had stated that at Bhabhua they met with Darogajee who carried them to jail and then, the Darogajee returned back after entrusting to another constable who was deputed there by stating that these persons have to participate in the TIP. He has further stated that at that very time, he was aged about 12 years. He along with his father were taken inside the jail but, first of all his father was taken to the place where TIP was to be conducted. After return of his father, he was taken to. The TIP was conducted in an open field inside the jail premises. He is not knowing how many persons were identified by his father. In para-5 he has stated that about 45-50 persons were standing in a queue and he identified out of them. Then there happens to be cross-examination relating to activity of



the dacoits during course of commission of the dacoity. Then he denied the suggestion that he along with his father was not present at the place of occurrence and account thereof, they have not seen any dacoits nor they have identified any of the dacoits. Then has denied the suggestion that police after apprehension of the accused persons called them and force them to identify whereupon, they identified the accused in dock.

14. The present controversy is guided by the two events. The first event is status of the witness and propriety of their evidence. Section 134 of the Evidence Act takes care of by laying down that the evidence of single witness it found credit-worthy, reliable as well as inspires confidence then, in that circumstance, admitting the same conviction could be recorded against an accused. The other circumstance happens to be proper acceptability of Section 9 of the Evidence Act which prescribes the facts to be taken into consideration, in establishing the identify of a person being relevant in the background of facts and circumstances of the case. That means to say, crime having been committed by unknown who have been identified during course of TI Parade, as well as during course of which being substantive evidence, has got relevancy in the eye of law being admissible in nature. Thus, from the evidence, as stated above, against appellant



Ramjee Mushar, there happens to be two identification while against remaining appellant single identification. But, the question now remains whether the same inspire confidence.

15. In order to adjudge, first of all over all situation is to be taken. All the family members including informant were not called upon to participate in the T.I. Parade, though it is needless to say that they have not claimed identification in dock. PW.1 has got political opportunity is out of question. Had there been examination of the I.O., the appellants would have an opportunity to cross-examining over the delay in holding T.I. Parade, reason why not victim and his family members were not allowed to participate during course of T.I. Parade, on the other hand why PW.1 and PW.2 only were taken to TIP, more particularly in the background of admission of PW.1, that he was in direct contact of S.P. and was being informed at his end regarding development. Furthermore, PW.1 tried to wrap presence of police but duly exposed at the end of his son, PW.2.

16. Magistrate also not been examined. Once magistrate has not been examined, on account thereof, the sanctity of the TIP goes away because of the fact that none was to say that the proper precaution was taken up during course of conduction of TIP. TIP is found duly acknowledgeable in accordance with



Section 9 of the Evidence Act and the mode of conduction of TIP is to be carried out in accordance the police manual. However, in order to maintain sanctity of TIP it should be at an earliest, as well as witnesses has got no access to see the accused before conduction of TIP.

17. From the record, it transpires that occurrence is of dated 07/08-01-1997, FIR was recorded on 08-01-1997, these appellants were produced on 21.01.1997 and TIP was conducted on 17-03-1997 and during the intermediary period, it is evident from the order sheet that these appellants have been produced before the court on every fortnight to facilitate further remand. It is further evident that for want of examination of the I.O., the appellants have been deprived of to cross-examine as well as to explore the inns and outs.

18. In *Satrughana @ Satrughana Parida & Ors. vs. State of Orissa* reported in (1995) 4 (suppl.) 448, it has been held:

“2. We have heard counsel on both sides. The fate of the appellants depends on the probative value to be given to the evidence of PWs 1, 4, 6 and 8 in regard to the identification of the appellants. It may be mentioned that the occurrence in question had taken place at midnight almost 1½ months prior to their identification. One of the appellants, Rabin Kandy was arrested on November 22, 1982, while the other two Rabindra Kumar Sahu and Satrughana were arrested on November 12, 1982. The identification



parade was held on December 10, 1982, i.e more than 15 days after the arrest of Rabin Kandy and almost a month after the arrest of the other two accused. The prosecution has not advanced any reason for not holding the identification parade promptly. In other words the prosecution has not placed on record the reason why it was not possible for it to hold the identification parade with promptitude, i.e soon after arrest. Where the fate of the accused persons hangs solely on the identification by the witnesses who claim to have seen them almost 1½ months prior to the date of identification, it is the duty of the prosecution to state why the identification parade could not be arranged immediately after the arrest of the accused and without loss of time. Unless there is good reason for the delay, the value regarding the evidence of identification gets adversely affected. This dilution of the evidentiary value of identification by witnesses who claim to have seen the accused at night almost 1½ months back but who did not in their statements before the police or in the first information report reveal any special features for identification, is a matter which weighs against the prosecution. It must be remembered that the accused persons are required to be produced before the court latest within 15 days of their arrest and, therefore, it would be reasonable to infer that they were so produced. There is nothing on the record to show that the prosecution had taken care to ensure that their identity was not revealed when they were taken to court and produced as required by law. In these circumstances, when the prosecution witnesses had admitted in their oral statements that they had not noticed any special identifying features, it becomes unsafe to place implicit reliance on the evidence regarding identification emanating from the proceedings at the test identification parade. In these circumstances since there is no other corroborative evidence, we find it difficult to place implicit reliance on the identification made at the test identification parade. We are, therefore, of the opinion that the appellants are entitled to benefit of doubt.



19. Weighing totality of the event, it is found and held that identification of these appellants by PW.1 as well as PW.2 are not at all free of suspicion coupled with non-examination of magistrate and I.O. make the situation more worsen whereupon, the judgment of conviction and sentence recorded by the learned lower court would not survive. Hence is set aside. Appeal is allowed. Appellants are on bail hence are discharged from their liabilities. First and last page of the judgment be handed over to the learned Amicus Curiae for the needful.

(Aditya Kumar Trivedi, J)

Vikash/Prakash Narayan

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