

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1028 of 2019**

Arising Out of PS. Case No.-64 Year-2015 Thana- SAMSTIPUR RAIL P.S District-
Samastipur

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MD. SHAMSUL, Son of Late Md. Kayum, Resident of village- Bara, Near
Mosque, P.S- Khodawanpur, District- Begusarai.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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with
CRIMINAL APPEAL (SJ) No. 1829 of 2019

Arising Out of PS. Case No.-64 Year-2015 Thana- SAMSTIPUR RAIL P.S District-
Samastipur

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DEVENDRA MAHTO, S/O- Late Sube Lal Mahto, Resident of Village-
Korai Badiya Tola, P.S.- Gadhpora, Dsitt.- Begusarai.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

(In CRIMINAL APPEAL (SJ) No. 1028 of 2019)

For the Appellant/s : Mr. Manish Kumar No 13, Adv.
Mr. Rohit Kumar, Adv.

For the Respondent/s : Mr.Ms. Abha Singh, APP

(In CRIMINAL APPEAL (SJ) No. 1829 of 2019)

For the Appellant/s : Mr. Mukesh Kumar No1,Adv.
Mr. Jitendra Kumar, Adv.

For the Respondent/s : Mr.Syed Ashfaque Ahmad, APP

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**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT**

Date : 20-11-2019

As these two appeals arise against common judgment of
conviction and sentence, hence heard together and are being
disposed off by a common judgment.



Appellants Md. Shamsul and Devendra Mahto have been found guilty for an offence punishable under Section 328 of the IPC and sentenced to undergo R.I. for four years as well as to pay fine appertaining to Rs.5,000/- and in default thereof, to undergo S.I. for two months, additionally, under Section 379 of the IPC and sentenced to undergo R.I. for two years, with a further direction to run the sentences concurrently, with a further direction that the period having undergone during the trial would be set off in accordance with Section 428 of the Cr.P.C. by judgment of conviction dated 18.12.2018 and the order of sentence dated 22.12.2018 passed by the Additional Sessions Judge-I, Samastipur in Sessions Trial No.164 of 2016 arising out of Samastipur (Rail) P.S. Case No.64 of 2015.

2. Informant Basant Kumar (PW-4) along with other passenger Pappu Kumar Yadav (PW-5) while were coming from Punjab by *Jan Sadharan Express*, in a way to Saharsa fallen prey at the hands of *Jaharkhurani* group who anyhow succeeded in getting sip of fruity beverage at Samastipur Junction by both of them resultantly getting themselves pranced. During course thereof, they have been deprived of mobile, cash, ATM Cards etc. Lastly they were found in unconscious state by the GRP Police personnel at Saharsa whereupon they were admitted to Sadar



Hospital and, after regaining consciousness they found their belongings missing. Whereupon Basant gave his *Fardbeyan*.

3. It is evident from the record that after registration of Samastipur (Rail) P.S. Case No.64 of 2015 against unknown, investigation commenced and during course thereof, some of the accused (since acquitted) were apprehended relating to Samastipur (Rail) P.S. Case No.69 of 2015 wherein they gave inculpatory judicial confessional statement showing their complicity with regard to the present case also and, on that very score got remanded in this case. Thereafter effort emerging over tracing out stolen mobile set and during course thereof has been ascertained that one Vikash Kumar was operating the same who, produced the same as per instruction and, on the basis thereof, all the accused including Md. Shamshul have been charge-sheeted followed with trial which ultimately concluded by way of recording conviction and sentence against the appellants while having judgment of acquittal relating to others.

4. Defence case, as is evident from the mode of cross-examination as well as the statement recorded under Section 313 of the Cr.P.C., is that of complete denial. However, nothing has been adduced in defence.



5. Altogether eight PWs have been examined at the end of the prosecution in order to substantiate its case who are PW-1, Vikesh Kumar, PW-2, Ram Ratan Rai, PW-3, Kauleshwar Kumar, PW-4, Basant Kumar, PW-5, Pappu Kumar Yadav, PW-6, Raj Narain Singh, PW-7, Sanjay Kumar Singh and PW-8, Dr. Anil Kumar. Side by side has also exhibited Exhibit-1, signature of the informant over the *Fardbeyan*, Exhibit 1/1, endorsement over the *Fardbeyan*, Exhibit-2, seizure list, Exhibit-3, *Fardbeyan*, Exhibit-4, formal FIR and Exhibit-5, medical report. As stated above, nothing has been adduced on behalf of the defence.

6. Heard learned counsel for the appellants as well as learned Additional Public Prosecutor and gone through the records.

7. From record, more particularly, the evidence of PW-6 as well as PW-7, the respective I.O., it is manifest that irrespective of the fact that there was inculpatory extra judicial confessional statement of the accused relating to Samastipur (Rail) P.S. No.69 of 2015 exposing themselves even relating to the instant case and, on the basis thereof, have been remanded, they have not been put on T.I. parade during course of investigation. Although, on call detail the activity of Vikash Kumar engaged in operating the stolen mobile was traced out as directed he produced the same with an



explanation that he purchased from Shamsul, but without testing. Furthermore over his activity, charge-sheet has been submitted. That means to say, conduct of Vikas Kumar has not been investigated. During course of trial it is evident that PW-2 has not shown interest with regard to the present case whereupon he was declared hostile. PW-3 Kauleshwar Kumar has not said a word against the appellants. PW-8 is the doctor who has simply examined PW-4 and PW-5. So, the case rests upon the testimony of PW-1, PW-4 and PW-5.

8. PW-4 is the informant as well as one of the victim, while PW-5 is another victim. If the initial prosecution version is taken together, it is apparent that both were sitting side by side and, when the train reached at Samastipur Junction, one person came having biscuit. He then, offered biscuit to them which they both ate. Then, that person got down, taken fruit for himself as well as for PW-4 and PW-5 also, offered and having sip by them, respective they both became unconscious. So, PW-4 and PW-5 have been victimized by the same person during the same course and that also happen to be their testimony in court but during course of dock identification, PW-4 has identified the appellant Md. Shamshul, while PW-5 has identified Devendra. That means



to say, they both are inconsistent over the mode of identification of the culprit who had handed over the fruity at Samastipur junction.

9. PW-1 is Vikesh Kumar who, during course of examination in chief, has stated that as directed by the police official, he produced the mobile set which he was operating as the police official disclosed that same was stolen one. He has further stated that one day, while he was sitting at the betel shop of his father, Shamshul came and offered to purchase the mobile which he purchased. During course of cross-examination at paragraph 5 he has stated that he came to know about the Shamshul on the date of purchase of mobile itself and at paragraph 7 he has stated that he has got no proof to substantiate regarding purchase from Shamshul.

10. At the present juncture evidence of I.O. (PW-6) appears to be more pertinent who during course of his cross-examination at paragraph 5 has stated that he has not gone/conducted raid at the house of Devendra Mahto. He has denied the suggestion that he had given undue favour to Vikesh Kumar, the actual culprit. At paragraph 6 he has admitted that he had not investigated in order to trace out whether Vikesh's father has got betel shop or not.



11. PW-7 during course of his examination-in-chief has stated that on a request made by him, during course of investigation, call detail was given by the Superintendent of Police (Rail), Muzaffarpur wherefrom he came to know that stolen mobile was being used by Vikesh Kumar, son of Ramashish Chaurasia of village- Begampur, P.S. Khodawalpur, District Begusarai and, its tower location was at Mahendru, Sultanganj. Whereupon he came to Patna, dialed Vikesh Kumar and as per direction, he produced the mobile set which he seized and for that production cum seizure list was prepared. However, during course of cross-examination at paragraph 3 he has stated that he was not at all investigating officer of the case, rather, on an oral instruction of the S.P. he had conducted the investigation.

12. It is needless to say that the evidence whatsoever been given in court, the identification having in court (dock identification) is the substantive piece of evidence. Furthermore, conduction of T.I. parade is not at all warranted under Cr.P.C. It happens to be a link duly recognized under Section 9 of the Evidence Act and the sole purpose happens to be with regard to proper identification that the mode of investigation is going on in right direction. That being so, identification in dock without conduction of T.I. parade, will not cast any dent in the prosecution



case and that happens to be consistent view of the Apex Court. That being so, identification in dock by the witnesses could not be said to be contrary to the spirit of law but, when the mode of identification is taken up, it is apparent that irrespective of the fact that both the victims that means to say, PW-4 and PW-5 were victimized by the same person but in court, they have identified two different persons and so identification on that very score appears to be hazy. Furthermore, the evidence of PW-1 in consonance with PW-6 and PW-7, did not inspire confidence and so, overall appreciation of the materials available on record do not justify the judgment of conviction and order of sentence. Consequent thereupon, the same is set aside.

13. Both the appeals are allowed. Both the appellants are under custody hence are directed to be released forthwith if, not wanted in any other case.

(Aditya Kumar Trivedi, J)

skpathak/-

AFR/NAFR	NAFR
CAV DATE	NA
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