

Form No. J(2)

IN THE HIGH COURT AT CALCUTTA
Criminal Revisional Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Siddhartha Roy Chowdhury

CRA 471 of 2019

Sukumar Mondal & Ors.

Vs.

The State of West Bengal

For the Appellants	:	Mr. Satadru Lahiri Mr. Sourav Paul
For the State	:	Mr. S. G. Mukherjee, Ld. P.P. Mr. Madhusudan Sur, Ld. A.P.P. Ms. Faria Hossain, Adv.
Heard on	:	27 th February 2023
Judgment on :	:	27 th February 2023

The Court:

This criminal appeal challenges the judgement and order of conviction passed by the learned Additional Sessions Judge, Fast Track, 1st Court, Jangipur, Murshidabad in Sessions Case No. 01 of 2011 (Sessions Trial No. 01(01) of 2011). By the impugned judgement, learned Trial Court recorded an order of conviction against three accused persons for committing offence under Section 392 of the Indian Penal Code and sentenced them to suffer rigorous imprisonment for seven years and to pay a fine of Rs.3000/- with a default clause. The accused persons were also sentenced to suffer seven years of rigorous imprisonment for committing offence punishable under

Section 394 of the Indian Penal Code and to pay a fine of Rs.5000/- subject to the provision of Section 428 of Code of Criminal Procedure.

Briefly stated Sri Sushil Kumar Saha set the criminal administration of justice into motion by informing the Inspector –in-charge, of Farakka Police Station that on 15.9.2010 at about 8 P.M. he left the Balurghat Depot of North Bengal State Transport Corporation on a bus bearing registration no. WB 63/3184 for Kolkata with passengers. When he arrived at Alinagar around 11 PM, left side tyre of the bus got punctured. The staff of N.B.S.T.C. alighted from the bus in order to change the tyre. Soon thereafter some persons appeared and assaulted the informant, his colleagues, and passengers of the bus. They snatched mobile phone and money from the passengers as well as from the staff of the bus. They took away a sum of Rs.2460/- from the conductor of the bus. As the information disclosed offence cognizable in nature, Farakka P.S. Case No. 335/2010 was registered on 16.9.2010 under Sections 394/397 of the Indian Penal Code. Police took up investigation which culminated into submission of charge sheet against the accused persons under Section 394/397 of the Indian Penal Code.

On 28.01.2011, the learned Trial Court framed charge under Sections 394/397/411/414 of the Indian Penal Code. The accused persons pleaded innocence and stood the trial. To crown success, prosecution examined as many as twenty three witnesses. Learned Trial Court after considering the evidence on record was pleased to pass the judgment impugned.

Assailing the impugned judgment Mr. Lahiri, learned counsel representing the appellants submits that learned Trial Court recorded the order of conviction primarily

on the ground that the accused persons were identified by the victims during investigation as well as during trial and incriminating articles were recovered from the possession of the accused persons. According to Mr. Lahiri, absolute misreading of evidence on record resulted into the impugned judgement. It is contended that the investigating officer claimed to have recovered the articles from the possession of the accused persons. As P.W. 23 S.I. Shimanta Kr Dutta stated that he arrested Asit, Sukumar Mandal and Eswar Mandal and searched their respective houses but nothing could be recovered. They were taken to police custody for five days. On 7th of November 2010 accused Asit, Sukumar Mandal and Eswar Mandal led to recovery of stolen articles. He identified those materials claimed to have been recovered from their possession. As rightly pointed out, no statement purportedly made by the accused persons, while in custody, was produced before the Court and admitted into evidence to substantiate that after arrest while in custody the accused persons made certain statements leading to recovery of stolen articles. In absence of such statements which would have been relevant under Section 27 of the Evidence Act the factum of alleged recovery is of no consequence particularly when the materials like, Nokia Mobile Phone are available in open market. P.W. 1, the victim and informant claimed to have identified three accused persons during T.I. Parade and he identified all three persons in Court as well. But during cross-examination he stated that there were twelve persons including the accused persons whom he identified during T.I. Parade, they wore different kind of dresses and they were of different size and height.

Mr. Lahiri argued further that Test Identification Parade ought to have been conducted by placing the suspect among ten other persons of similar stature with

similar kind of attire as far as practicable which the Superintendent of correctional home failed to follow.

Drawing my attention to the testimony of P.W. 4 the Controller of the Sub-Correctional Home, Mr. Lahiri submits that witness admitted that he did not supply any dummy while holding T.I. Parade inside the correctional home though P.W. 5 Smt. Lina Sharma stated that Dummies were in the same wearing apparels i.e. Lungi and Shirt and were of same complexion and each of the four witnesses identified the accused persons. This contradiction appearing in the narrative of P.Ws. 4 and 5 strikes at the root of the prosecution case so far as question of identify of the accused persons are concerned.

Mr. Sur, learned Additional Public Prosecutor submits that P.W. 1 identified the accused persons and such evidence alone is sufficient to hold that the accused persons and none else were the waylaid who committed dacoity on the date of incident. Learned Trial Court having considered the evidence on record pronounced the judgement holding the accused persons guilty and this impugned judgement does not warrant any interference.

But as I have already discussed the contradictory testimony of P.Ws. 4 and 5 gives birth to two different versions in the narrative of the prosecution. According to P.W. 4, T.I. Parade was held without there being any dummy and Under Trial Prisoners who were made to appear in the T.I. Parade together with the suspect were of different stature and with different attire, while P.W. 5, learned Judicial Magistrate stated that the Under Trial Prisoners who attended the T.I. Parade with the suspect were of same appearance, stature etc. When two views transpire and one tilts in

favour of the accused persons, it is a settled principle of law that benefit of doubt in such a situation should be extended to the accused persons.

True it is some mobile phone etc. were produced in course of trial and admitted as material exhibits but the evidence of P.W. 12 in this regard creates a dent in the prosecution case. P.W. 12 stated that after one and half months of incident police came and took Morshed Sk. to the house of Asit Mandal. It was around 12-12.30 AM when police recovered one mobile phone from Asit Mondal and seized the same but the witnesses remained outside the house of Asit Mandal at the time of recovery and police officer disclosed that mobile phone was found. Thus, testimony of P.W. 12 regarding recovery is inadmissible being hearsay in view of Section 60 of the Evidence Act. Morshed Sk., however, did not support the testimony of P.W. 12 and his statement is contrary to the deposition of P.W. 12 who claimed that Morshed Sk. was with him. P.W. 9, Soumen Choudhury, was one of the victims during evidence in chief, and he identified the accused Sukumar Mandal as one of the miscreants. But during T.I. Parade, he could not identify the suspect. Therefore, such identification by P.W. 9 while adducing evidence in Court is of no consequence. The witnesses like P.Ws 17, 20, 22 though admitted their signatures on the seizure list but did not support the prosecution on the point of recovery. The prosecution was given liberty to examine those witnesses in the light of Section 154 of the Evidence Act but attention of I.O. P.W. 23 was not drawn to such statement made by the witnesses.

Under such circumstances, the factum of recovery cannot be said to have been proved beyond reasonable doubt by the prosecution.

The decision of the Hon'ble Apex Court pronounced in the case of Digamber Vishnav and Anr. Vs. State of Chhattisgarh reported in (2019)4 SCC 522; Bharama Parasram Kudhachkar vs. State of Karnataka reported in (2014) 14 SCC 431; Mousam Singha Roy & Anr. Reported in (2003) 12 SCC 377; State of Rajasthan vs. Talevar and Anr. Reported in (2011) 11 SCC 666 may be looked into in this regard.

In the case of Gireesan Nair and Ors. vs. State of Kerala reported in (2023)1 SCC 180 the paragraphs 28, 29, 30 and 33 read as follows:-

“28. We may, at the outset, note that the eyewitnesses questioned by the prosecution did not give out the names or identities of the Accused participating in the riot and involved in the destruction of public property. Therefore, the IO (PW84) had to necessarily conduct a TIP. The object of conducting a TIP is threefold. First, to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was seen by them in connection with the crime. Second, to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. Third, to test the witnesses' memory based on first impression and enable the prosecution to decide whether all or any of them could be cited as eyewitnesses to the crime (Mulla and Anr. v. State of U.P.19).”

“29. TIPs belong to the stage of investigation by the police. It assures that investigation is proceeding in the right direction. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant (Matru alias Girish Chandra v. State of U.P.20; Mulla and Anr. v.

State of U.P.²¹ and C. Muniappan and Ors. v. State of Tamil Nadu²²). The evidence of a TIP is admissible under Section 9 of the Indian Evidence Act”.

“30. It is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that a TIP is held without avoidable and unreasonable delay after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses before the test identification parade.”

“33. While conducting a TIP, it is a sine quanon that the non suspects should be of the same age group and should also have similar physical features (size, weight, colour, beard, scars, marks, bodily injuries etc.) to that of the suspects. The concerned officer overseeing the TIP should also record such physical features before commencing the TIP proceeding. This gives credibility to the TIP and ensures that the TIP is not just an empty formality.”

When I consider the inconsistent testimony of P.W. 4 and P.W. 5, I feel no hesitation to hold that prosecution has failed to prove the identity of the accused persons or in other words failed to build bridge between the alleged incident and the accused persons and such failure impedes the Court to be in agreement with the view expressed by the learned Trial Court.

Since the prosecution has failed to prove the charges beyond reasonable doubt, I am inclined to set aside the judgement impugned and record an order of acquittal. The appellants who are in custody be released at once if not wanted in any

other case subject to executing bond under Section 437A of the Cr.P.C. for six months.

The criminal appeal, is thus, disposed of.

Let a copy of the judgment along with lower court record be sent to the learned Trial Court for information and necessary action.

(Siddhartha Roy Chowdhury,J)