

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 473 of 2008

Samir Mahato

Vs.

The State of West Bengal

With

CRA 532 of 2008

In

CRR 3802 of 2008

Kailash Kalindi

Vs.

The State of West Bengal

For the Appellant : Mr. Santunu Talukdar
(Amicus Curiae)

For the State : Mr. Avisekh Sinha

Heard on : 28.02.2023, 22.03.2023, 23.03.2023, 04.08.2023.

Judgment on : 10.08.2023.

Ananya Bandyopadhyay, J.:-

1. These instant two criminal appeals and criminal revisional application are preferred against the judgment and order of conviction dated 24.06.08 and 26.06.08 passed by Learned Additional District and Sessions Judge, Fast Track Court-2, Purulia in Sessions Trial No. 04/2008 arising out of Sessions Case No. 23/2008 convicting the appellants under Sections 392/34 of the Indian Penal Code.

2. The prosecution case originated on the basis of a complaint filed by one Sk. Shakil, inter alia, stating that on 17.11.2007 at about 7.20 p.m. while he was returning to Tatari from Purulia accompanied by two of his cousins on a black Bajaj Pulsar Motorbike with no. JH-O1L/4003 was intercepted by four miscreants from the opposite sides riding two motorbikes, who thereafter robbed his motorbike, a sum of Rs.1,500/- and a gold HMT wrist watch. The de-facto complainant identified the number plate of one of the motorbikes to be JH-OIN/0786 TVS Victor. He could not see the number plate of the other CD DON motorbike. The miscreants were 5'4" in height and had covered their faces with cloths conversing in Bengali and Hindi language. The de-facto complainant sought for investigation and necessary actions.
3. Based on the aforesaid complaint Purulia P.S. Case No. 122 of 2007 dated 17.11.2007 under Section 392 of the Indian Penal Code was instituted. On submission of charge-sheet, charges were framed to which the appellants pleaded not guilty and claimed to be tried.
4. The prosecution cited 14 witnesses and exhibited certain documents.
5. Learned Amicus Curiae for the appellants submitted that
 - i. The Learned Judge failed to apply his judicial mind properly and minutely at the time of passing the order of conviction and sentence and as such the same is liable to be set aside.
 - ii. The Learned Judge, noticed but avoided, that the written complaint of the case has not been made part of the record during trial and consequently it has not been proved and as such the impugned order of conviction and sentence is liable to be set aside.

- iii. The Learned Judge failed to consider that the T.I. Parade has not been held properly and as such the impugned order of conviction and sentence is liable to be set aside.
- iv. The recovery of Motor Cycle leading to the statement of the accused/appellant is not legal and as such the impugned order of conviction and sentence is liable to be set aside.
- v. The PW-14, the Investigating Officer stated in evidence that he questioned the accused/appellant (herein) thereafter he recorded his statement. That question answer session vitiates the fact that the accused stated the alleged fact voluntarily.
- vi. Learned Judge failed to appreciate that there was a considerable delay in between the statement of the accused and the recovery and as such the impugned order of conviction and sentence is liable to be set aside.
- vii. The Learned Judge failed to appreciate that the statement does not contain that the accused stated the place where from it could be recovered and as such the impugned order of conviction and sentence is liable to be set aside.
- viii. It is clear from the evidence of Investigating Officer that the hut from where the Motor Cycle was recovered, was open having no door and the pond of which bank the hut is situated was accessible to the people and as such the impugned order of conviction and sentence is liable to be set aside.
- ix. The Learned Judge failed to consider that the Investigating Officer has not indicated as to why, even though the accused was in

custody, it took the police so much time to effect the discovery in question. The totality of the evidentiary value of the evidence of discovery therefore, gets considerably weakened because of the delay factor.

- x. The Learned Judge failed to consider that the recovered Motor Cycle had no number plate at the time of recovery and as such it cannot be ascertain that the disputed Motor Cycle had been recovered.
- xi. The Learned Judge failed to consider that there were only 4 (four) accused persons in the Motor Cycle, as per F.I.R. and all along during the trial, therefore the charge under Section 395/34 of the Indian Penal Code is absolutely illegal and as such the impugned order of conviction and sentence is liable to be set aside.
- xii. The Learned Judge failed to note that the prosecution has not been able to prove the case beyond reasonable doubt and as such the conviction and sentence is liable to be set aside.
- xiii. The Learned Judge failed to consider the evidence of the witnesses minutely and passed the judgment superficially and without any application of mind.
- xiv. The framing of charge is highly defective and as such the conviction and sentence is liable to be set aside.
- xv. The Learned Judge failed to consider the scope and ambit of Section 360 of the Code of Criminal Procedure.

- xvi. The Learned Judge failed to consider that the examination of the accused persons having not been made in conformity with law, the conviction and sentence is liable to be set aside.
 - xvii. The impugned order of conviction and sentence is otherwise bad in law.
6. The Learned Advocate for the State submitted that the appellants were identified in the T.I. Parade, the lost motorcycle was recovered and on the basis of corroborative evidence the prosecution aptly proved its case and the appeal shall be dismissed.
 7. The evidence of PW-1, PW-3, PW-4, PW-6, PW-7, PW-10 is based on hearsay.
 8. PW-4 stated to have signed the seizure list and identified his signature marked at Exhibit-1 being unaware of its contents.
 9. PW-2, PW-5 and PW-13 substantially reiterated the narrative of the complainant emphasizing the mode and manner in which the offence was committed by the miscreants, the role played in the identification of the appellants through the process of T.I. Parade, though PW-5 failed to identify the offenders, PW-2 and PW-13 identified the present appellants, which was corroborated by the evidence of PW-9 and PW-11, the Learned Judicial Officers respectively who held the T.I. Parade in connection with G.R. Case No. 848 of 20007 at District Correctional Home, Purulia.
 10. The last motorcycle was recovered from the place identified by the appellant Kailash Kalindi who was taken to the said spot near a pond by the police at his instance as revealed from the deposition of PW-14, the Investigating Officer corroborated by the evidence of PW-12 who deposed the appellant

Kailash Kalindi to have pointed out one hut situated on the bank of the pond, wherefrom one Bajaj Pulsar Motorcycle was recovered. Police seized the motorcycle under a seizure list which was signed by PW-12sd and identified his signature marked as Exhibit 1/1. His deposition remained unshaken during the cross-examination.

11. Assessing the evidence on record both oral and documentary, this Court is of the opinion that the Learned Trial Court through a reasoned justification rightly convicted the appellants.
12. In view of the above discussions, both the criminal appeals are dismissed. Rule being No. CRR 3802 of 2008 stands discharged.
13. I record my appreciation for the able assistance rendered by Mr. Santanu Talukdar, Learned Advocate, as Amicus Curiae in disposing of the appeal.
14. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
15. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)