

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

Before: Hon'ble Justice Sugato Majumdar

CRA 557 of 2015

Kuddus Mir

Vs.

The State of West Bengal

With

CRA 560 of 2015

Biswanath Sarkar @ Sk. Rahul & Anr.

Vs.

The State of West Bengal

I.A No. CRAN/1/2015 (Old No. CRAN/2865 /2015)

For the Appellant in

CRA 557 of 2015

: Mr. Satadru Lahiri

For the Appellant in

CRA 560 of 2015

**: Ms. Anasuya Sinha
Mr. Avishek Sinha
Ms. Pallavi Priyadarshee**

For the State

**: Mr. Narayan Prasad Agarwala
Mr. Imran Ali
Mr. Debjani Sahoo**

Hearing concluded on

: 16/03/2023

Judgment on

: 30/03/2023

Sugato Majumdar, J.:-

These two criminal appeals arise from a common judgment of conviction dated 06/04/2015 and order of sentence dated 07/04/2015 passed by the Additional Sessions Judge, 1st Court, Sealdah whereby the present appellants were convicted under Section 392 of the Indian Penal Code to suffer rigorous imprisonment for a term of seven years and to pay fine of Rs. 2000/- each in default of which they would suffer a further imprisonment of six months.

Genesis of the case is the written complaint dated 15/04/2012 made by the de-facto complainant Raju Das to the Officer-in-Charge, Phoolbagan Police Station. The de-facto complainant has a cloth shop named "Gitanjali" at 20 A.P.C. Road, Kolkata. The day before, he opened his shop at 11:00 a.m. and closed it at 11.30 p.m. since that particular day was the first day of Bengali calendar year, namely "*poila baishakh*". His eight years old son was with him that day. They were waiting before Jagat cinema hall to catch a shuttle taxi to reach home. After waiting for 20 minutes a car (Tata Indica) came nearby shouting "airport, airport". The windowpane of the car was black. The de-facto complainant asked whether it would go to Baguihati to which the driver agreed. There were four persons inside the car including the driver. The driver was in the front row along with another person whereas the back seat was occupied by two other persons. The first person sitting on the left-hand side of the back seat came down to accommodate the de-facto complainant along with his son in the middle of the seat. After some time, the driver rolled-up the window panes and the person sitting beside the driver took out a fire arm and placed the same on forehead of the son of the de-facto complainant demanding ornaments. Ultimately those persons snatched away

valuable gold ornaments and mobile handset from the de-facto complainant and forced out them from the car. They gave him fifty rupees as bounty to reach home. Subsequently he got a taxi to return home. On the next day he lodged the complaint.

The complaint was received by the concerned police station and registered as Phoolbagan P.S. Case No. 106 dated 15/04/2012 under sections 392/397 of the Indian Penal Code read with section 25 (1B) (a) of the Arms Act. After initial investigation by the local police station the Detective Department of Kolkata Police took over the investigation. On completion of the investigation charge sheet was filed under Sections 392 and 397 of the Indian Penal Code. The Additional Chief Judicial Magistrate committed the case to the Court of Sessions. Subsequently the case was transferred to the original trial court.

Charges were framed which were read over and explained to the accused persons to which they pleaded not guilty and claimed to be tried. Hence the trial began.

In course of trial the prosecution examined as many as 16 witnesses, and used various documents as evidence which were marked variously from Ext. 1 – 26. The prosecution also adduced material evidences which wear also marked variously as Mat. Ext. I – V.

The accused persons were examined under section 313 of the Code of Criminal Procedure, 1973. Defense of the accused persons were false implication and allegations.

The Trial Court on completion of the trial came to the conclusion that the accused persons were guilty of the offence charged under Section 392 of the Indian Penal Code. They were convicted and sentenced to suffer rigorous imprisonment for seven years and fine of Rs. 2000/- in default of which imprisonment for a further period of six months.

On being aggrieved and dissatisfied, two different appeals are preferred by the accused persons.

The learned Counsel appearing for the appellants in Criminal Appeal No. 560 of 2015 argued that P.W. 1 namely the plan maker, categorically stated that the plan was prepared as per direction of the investigating officer thereby rendering the plan and the place of occurrence is doubtful, according to Ms. Sinha, learned Counsel.

Next, it is argued that the written complaint was lodged after a few hours of the incident after much speculation. The written complaint does not contain any description of the purported stolen gold chain. No specifications are given in respect of the articles stolen articles. The written complaint also fails to give any details of the car alleged to have been involved in the incident. Furthermore the car was never seized. The description was car was also not given by the de-facto complainant in course of trial. The miscreant who held a gun pointed at behaviour peace son of the de-facto complainant was neither arrested not put on trial. The place around Jagat cinema hall is a thickly populated area. The investigating agency did not examine any person of the locality. This is a lacuna in the investigation of the case.

Next it was argued that the test identification parade was not properly done. Ideally in a test identification parade all the suspects should be of same height and stature. However, in the instant case the suspects were of different stature and height, some of them were bearded and some of them were shaved. This vitiates and undermines the identification in test identification parade. It was further argued that admittedly light inside the car was not glowing. It is hard to believe that in absence of light the de-facto complainant observed the faces of the appellants and remembered their faces subsequently.

Next, it was argued by Ms. Sinha that P.W. 3 is a chance witness. His name neither figured in the written complaint nor mentioned by the de-facto complainant in course of examination. His evidence cannot be relied upon because mostly his evidence was procured by the investigating agency.

Next, it was argued by Ms. Sinha that son of the de-facto complainant is a vital witness. He should be examined to corroborate the evidence of the de-facto complainant and to highlight on the truth of the matter. There is no explanation on behalf of the prosecution as to why he was not examined. Non-examination of the son of the de-facto complainant undermines the prosecution case seriously for which doubt is cast in the prosecution case.

It was further argued by Ms. Sinha that P.W. 4 was a member of the raiding team that arrested Sadiyar Sheikh on 06/05/2012. He stated that upon arrest and on search one purse, cash of Rs. 25/-and a receipt of purchasing jewellery was recovered from the possession of Sadiyar Sheikh. However he exaggerated by saying that the purse contained one mortgage receipt containing

the name of Annapurna Jewellers. Such witness should not be believed as he improved his version gradually. Even the seizure list there is no mention of name of any jewellery shop. P.W. 6 who is the owner of Annapurna Jewellers stated in evidence that Sadiyar Sheikh mortgaged the gold ring but he further stated that there is no note in his register in that respect. Furthermore, there is no specification of the gold ring in the receipt book. Therefore, recovery of the gold ring is shrouded with doubts and mystery P.W. 8 and P.W. 9 witnessed recovery of gold chain at the instance of Biswanath Sarkar. P.W. 9 is a chance witness who happened to be present at the shop-room at the time of seizure. He stated in evidence that he previously made a statement to the police that he noticed the letters "DJ" written on the "S" of the chain. It is hard to believe that a bystander shall notice such specifications and details at the time of recovery of the alleged stolen article. Recovery of the gold chain is, therefore, also shrouded with mystery and doubts. In nutshell, it is argued by Ms. Sinha that the investigation was done perfunctorily, vital witnesses were not produced and evidences suffer from serious contradictions and anomalies undermining the prosecution case. Therefore, according to the learned Counsel, allegations against the appellants are not proved beyond doubt. The Trial Court failed to appreciate evidence properly. Therefore, the appellants should be acquitted on benefit of doubt. Ms. Sinha relied upon:-

- i. Satrughana @ Satrughana Parida Vs. State of Orissa 1995 Supp (4) SCC 448.
- ii. Gireesan Nair and Others Vs. State of Kerala (2023) 1 SCC 180.

- iii. Bharama Parasram Kudhachkar Vs. State of Karnataka (2014) 14 SCC 431.
- iv. Bobby Vs. State of Kerala (2023) SCC Online SC 50.
- v. Digambar Vaishna & Anr. Vs. State of Chattishgarh (2019) 4 SCC 522.
- vi. State of Rajasthan Vs. Talevar and Anr. (2011) 11 SCC 666.
- vii. Gadadhar Chandra Vs. State of West Bengal (2022) 6 SCC 576.

Mr. Lahiri appearing for the appellant Kuddus Mir in Criminal Appeal No. 557 of 2015 vehemently argued that recovery of stolen articles from the appellant is not established. Evidence fails to prove and the articles were definitely planted as there was no specification of the articles recovered, in the statement or evidence of the de-facto complainant, P.W. 2. Mr. Lahiri further argued that for the first time in evidence the de-facto complainant mentioned that the alleged car involved in the offence was of steel colour. This is embellishment in evidence of the de-facto complainant. According to him, the evidence of the de-facto complainant is rife with contradictions of serious nature. Prosecution evidence, according to him is not convincing and cogent enough to bring home the guilt of the appellant. According to him there was erroneous fact-finding and appreciation of evidence by the Trial Court which warrants interference of this court in setting aside the impugned judgement of conviction and the order of sentence.

Mr. Agarwala, appearing for the State negated the arguments so advanced on behalf of the appellants. According to Mr. Agarwala non-examination of the son of the de-facto complainant is not so vital so as to undermine the otherwise

reliable prosecution case. According to Mr. Agarwala it is the quality of evidence not quantity which is of prime importance. Evidence of P.W. 2 namely, the de-facto complainant is convincing and cogent enough to establish the prosecution case was.

Next, it is argued by Mr. Agarwala that is written complaint is not an encyclopaedia. It is not supposed to contain every minute detail of the facts. Omission of the name of P.W. 3 in the written complaint is not fatal. If a person was present on the place of occurrence and eye witnessed a part of the incident his evidence cannot be discarded only on the ground that he is a chance witness was. Even if he is a chance witness, his evidence is corroborative in nature. Therefore, there is no scope or question to discard his evidence.

Next it is argued by Mr. Agarwala that the appellants were identified on dock. Identification on dock is more convincing and acceptable than their test identification parade. Even it is not necessary that test identification parade should be conducted at all. Therefore, according to Mr. Agarwala argument at first by the appellants in respect of test identification parade is not convincing.

Next point argued by Mr. Agarwala is that articles were recovered on the basis of leading statements of the applicants and accused persons. Relevant part of their statements are adduced in evidence and marked as exhibits. Recoveries of stolen articles were witnessed by independent witnesses. The de-facto complainant identified those articles in Court. Seizure witnesses were examined and cross-examined. In the whole process of recovery proper legal paraphernalia were scrupulously followed. Nothing is there in evidence to vitiate or set at

naught the recovery of stolen articles. Arguments advanced on behalf of the appellants hold no ground. In nutshell, Mr. Agarwala argued that the Trial Court rightly appreciated the evidence in proper perspective without any area or fault. Therefore, according to him, the impugned judgement of conviction and the order of sentence should not be interfered into.

I have heard the rival submissions.

The prosecution case is based on testimony of the de-facto complainant, namely P. W. 2 and P. W. 3, identification of the accused persons by them, recovery of stolen articles on the basis of leading statements of the accused persons, identification of the stolen articles by P. W. 2, and testimony of the seizure witnesses. It is settled law that F.I.R. is not an encyclopedia. Even when the F.I.R. is not as full as could be, it cannot be ignored altogether. It can be used for corroboration of the statement of witnesses [**Abdul Goni & Ors. Vs. State of M.P.; AIR 1954 SC 31**]. Criminal Courts should not be too fastidious with mere omissions in the First Information Report since the statements and contents of the F.I.R. are not expected to be chronicle of every detail in [**Pedda Narayana Vs. State of A.P.; AIR 1975 SC 1252**]. Although, as argued, the number or detailed descriptions of the car in question are absent in the F.I.R., such absence cannot be said to have caused any prejudice to the appellants.

The F.I.R. was lodged on the next day. The fact of the case is that the incident took place at mid night. Written complaint was lodged on the next date. This cannot be said to be a delayed one, as appears from the explanation of the P.W. 2, the de-facto complainant.

The learned Counsels appearing for the appellants brushed aside the evidentiary value of testimony of P. W. 3 on the ground that he was a chance witness and that his presence has never been mentioned by the de-facto complainant. Neither in the written complaint nor in course of oral testimony P. W. 2, the de-facto complainant disclosed the name of P.W. 3 as accompanying him while he was waiting for the taxi on 15/04/2012. P.W. 3 stated that he was waiting in the bus stop along with the de-facto complainant. He saw the accused persons inside the car. He stated in his evidence that he identified them in taste identification parade, after that night. There is nothing to indicate that either the accused persons or their photographs were shown to P. W. 3 in between time. It was pointed out by the learned Counsel for the appellants that P.W. 3 admitted in course of evidence that there was no light inside the car. In that situation, remembering the face of the appellants, seen in darkness and identifying such faces after lapse of one month is rather unnatural. This imports doubts and suspicious in the evidence and identification by the appellants.

One thing must be kept in the mind. The place where P.W. 3 was standing was a bus-stop. Numbers of persons are supposed to be there to catch bus or taxis to return home. Presence of P.W. 3 at that busy public place is not unnatural. Nothing is there to indicate that P.W. 3 nurtured any motive to falsely implicate the appellants. Moreover, evidence of P.W. 3 is corroborative to the testimony of P.W. 2, which is in-tandem. In other words, evidence of the chance witness and evidence of the de-facto complainant are corroborative to each other. Therefore, evidence of P.W. 3 cannot be discarded or disregarded.

P.W. 2 namely the de-facto complainant identified the appellants in taste identification parade as well as on dock. His identification of the appellants was tried to be brushed aside by the learned Counsel for the appellants on the ground that test identification parade was not properly held. It is settled law that identification in test identification parade is not a sacrosanct. Evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of test identification seems to be to test and strengthen the trustworthiness of that evidence. It is considered, therefore, a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them in the form of earlier identification proceeding [**Budhsen Vs. State of Uttar Pradesh; AIR 1970 SC 1321**]. Both P.W. 2 and P.W. 3 identified the accused persons namely the present appellants in test identification parade as well as on dock. P.W. 2, in course of cross examination, stated that neither the photographs of the appellants were shown to him before test identification parade nor he was taken to the Presidency Correctional Home by police vehicle to identify the appellants in test identification parade. Therefore, identification of appellants' by the witnesses namely P.W. 2 and P.W. 3 cannot be discarded. In **Satrughana vs State of Orissa [(1995) Supp (4) SCC 448]**, relied upon by the appellants the Supreme Court of India, the Court observed that nothing was there on record to show that the prosecution had taken care to ensure that identity of the accused persons was not revealed when taken to Court and produced as required by law. The court noticed that there was no corroborative evidence to identification in test identification parade. This case was decided in facts and circumstances of its own.

Similarly, in **Gireesan & Ors. Vs. State of Kerala [(2023) 1 SCC 180]** Supreme Court of India noticed that the suspects were seen by the witnesses before the test identification parade; the suspects were photographed and videographed. In the situation, where the accused was shown to the witness before test identification parade, the later was only a formality. It was also observed by the Court that in that situation not only the test identification parade is inadmissible but identification in the Court becomes meaningless. Ratio of this case is of not much help to the appellants as they were decided in the context of facts and circumstances specific to themselves. Identification of the appellants' cannot be discarded, therefore, for reasons stated above.

Stolen articles were recovered on the basis of statement of the applicants recorded under Section 27 of the Indian Evidence Act. These articles were seized in presence of independent seizure witnesses. The seizure witnesses were examined and cross-examined at length. Testimony of the seizure witnesses does not cast any serious doubt in the process of seizure. Part of the statements of the applicants recorded under Section 27 are adduced in evidence and marked as exhibit. All the articles were recovered at the instance of the appellants as articles stolen in course of robbery. All the stolen articles were identified by the P.W. 2 namely the de-facto complainant on dock. Minor omissions in mentioning specifications of those articles do not undermine the evidentiary value of otherwise cogent evidences adduced on behalf of the prosecution. In **Bharama Parasram Kudhachkar vs State of Karnataka [(2014) 14 SCC 431]** all the witnesses became hostile. Even the seizure witness and the person to whom stolen articles were sold became hostile. The Supreme Court observed that the articles recovered

where of common use and were available to all and sundry. The only evidence was statement recorded under Section 27 of the Indian Evidence Act leading to recovery of articles. On that ground order of conviction was set aside. This is not a case where the witnesses turned hostile leaving a very few pieces of acceptable evidence. Ratio of **Bharama Parasram Kudhachkar's** case is not of much help for the appellants.

The investigating officer namely P.W. 16 stated in evidence that attempts were made to arrest the fugitive offender but could not be fructified. He also stated in course of evidence that attempts were also made to recover the car involved in the incident but could not be found. These are not the grounds for which the prosecution case should be looked into with doubts and suspicions.

Evidence adduced by the prosecution before the Trial Court was cogent and reliable. Evidences are corroborative. Except minor omissions there is contradiction to undermine or set at naught the prosecution case. Furthermore, F.I.R. is not encyclopedia to contain every detail. Omissions in F.I.R. of every detail do not render the prosecution case doubtful by itself only. In view of the fact that the prosecution proved the case beyond doubt, non-examination of the son of the de-facto complainant is not fatal for the prosecution case, on the basis of the principle that it is weight of evidence, not number which matters.

The Trial Court appreciated the evidences properly and came to the conclusion applying the correct principles of law. Therefore, the impugned judgment of conviction demands no interference. However, considering the fact that the appeal has been pending for long sentences of the appellants are reduced

to six years instead of seven years. The appellants shall suffer rigorous imprisonment for a term of six years instead of seven years. To this extent only the order of sentence is modified.

In nutshell the instant appeal is partly allowed only modifying the term of sentence without interfering with the judgment of conviction. The appellants shall surrender before the Trial Court to serve out the rest of the sentences.

Accordingly, the instant appeal is disposed of. A copy of the order along with the lower court record be sent back to the trial court forthwith.

Both the appeals are accordingly disposed of along with pending applications, if any.

(Sugato Majumdar, J.)