

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

**C.R.A. 581 of 2005
Md. Selim Sk. @ Chikna Khan
Vs.
The State of West Bengal**

With

**C.R.A. 730 of 2004
Sanwar Hossain Jamadar & Ors.
Vs.
The State of West Bengal**

For the Appellants : Mr. Apalak Basu
(*Amicus Curiae*)

For the State : Ms. Faria Hossain
Mr. Anand Keshari

Heard on : 26.06.2023, 08.08.2023, 05.10.2023, 08.12.2023.

Judgment on : 08.03.2024

Ananya Bandyopadhyay, J.:-

1. These two criminal appeals are preferred against the impugned judgment and order dated 29.09.2004 passed by the Learned Additional District and Sessions Judge, Fast Track Court, 2nd Court, Diamond Harbour, South 24 - Parganas in Sessions Trial Case No. 3(1) 2004 arising out of Sessions Case No. 121 (11) 2003, G.R. No. 1017/2003, (State Vs. Sanwar Hossain Jamadar & Ors.), convicting the appellants under Sections 399 and 402 of the Indian Penal Code and 25(1)(a) of the Arms Act and sentencing them to suffer 7

years of rigorous imprisonment each along with fine of Rs.5,000/-, in default simple imprisonment for 2 years for the offence committed under Section 399 of the Indian Penal Code and 7 years of rigorous imprisonment and also a fine of Rs.5,000/-, in default 2 years simple imprisonment for the offence committed under Section 402 of the Indian Penal Code and also 7 years simple imprisonment and also a fine of Rs.5,000/- in default simple imprisonment for 2 years for the offence committed under Section 25(1)(a) of the Arms Act.

2. The prosecution case stated that on 22nd September, 2003 at 5.34 P.M., the police got an information that some persons gathered in Nishintapur Railway crossing for the purpose of preparing for committing offence in nearby fish market and the police immediately rushed to the spot and arrested 5 persons along with pipe gun and bombs. According to police others fled away and later on arrested another person and started a case against the appellants along with others under Sections 399/402 of the Indian Penal Code and 25(1)(a) of the Arms Act and the case started being Kulpi Police Station Case No. 0122 dated 22.09.2003 under Sections 399/402 of the Indian Penal Code and Sections 25/27 of the Arms Act.
3. The police filed charge-sheet against the present appellants and others, i.e., against 6 persons and the trial was started against 6 persons and by judgment and order dated 22.09.2004 the Learned Court below acquitted two accused persons and declared conviction against the 4 persons i.e. appellant in CRA 581 of 2005 and appellants in CRA 730 of 2005.

4. The Learned Amicus Curiae for the appellants submitted the following observations for consideration:-

a) Differences in the time of occurrence:

As per FIR	Information received at 23.35 hours (overwritten) General Diary at 17.35 hours on 22.09.2003	
As per Charge	22.10 hours on 22.09.2003	
PW	Examination-in-chief	Cross-examination
PW-1		We reached at the spot at about 8.30 p.m.
PW-2		We reached at the spot at about 8/8.30 p.m.
PW-3	Incident took place at about 5.30 p.m.	
PW-4		We started at about 6.30 p.m. and reached at about 8/8.30 p.m. We then arrived at the P.S. apprehending them after 9.30 p.m.
PW-5	5.30 p.m. as per direction of Officer-in-Charge forces proceeded	We proceeded at 8/8.30 p.m. and it took about 20/25 minutes to reach. We came back after 10 p.m.
PW-6	At about 8/8.30 p.m. I went with O.C.	Came back at about 9 to 9.30 p.m.
PW-7	On this date at about 5.30 p.m. I went to Nischintapur Rail Gate	Came back at about 10.30/11 p.m.
PW-8		We proceeded at about 5.30 p.m.
PW-9	Conducted raid at about 5.30 p.m.	We came back from the spot at about 10/10.30 p.m.
PW-10	Train of 7.15 p.m. just passed. At that time police arrived and asked my name.	
PW-12	I was present in my shop at about 7.p.m. and at that time	

	and in that night no incident took place.	
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The above chart depicts that all the witnesses contradict each other regarding the time of occurrence of the event. There is overwriting in the formal FIR and different prosecution witnesses gave different versions as to time.

b) Discrepancy regarding place of occurrence

PW-1	 Other constables had been to the rail gate of Nishchintapur by a police van and seeing the police van, some boys started running.	Alamats were seized near gumti/ghar of station.
PW-2	We were proceeding towards the rail gate on foot Thereafter we noticed very soon that 7-8 persons started running.	
PW-3	We saw that near the rail gate some miscreants gathered and they were whispering with each other. Thereafter, we chased them.	
PW-4	We arrived at Nishchintapur railway gate and saw that seeing us some of the miscreants started running.	
PW-5	 other forces proceeded to Nishchintapur Market We observed that 8/10 persons were assembled at a place and seeing us they started running.	
PW-6	Nishchintapur rail gate.	
PW-7	Nishchintapur railway gate.	
PW-8	Nishchintapur rail gate. We were waiting at a place as directed and after that we noticed some miscreants were assembled in a room near the rail gate and on challenge	

	some of them fled away.	
PW-15	Nishchintapur rail gate.	

c) Faulty Recovery

PW	Things recovered	
PW-1	Vojali, pipe guns, bombs.	1 pipegun was seized from Akbar. Another pipe gun was recovered from Rafik. Those alamats are not produced today before this Court.
PW-2	3 loaded pipe guns were recovered from Santu, Sanwar, Rafikul, Vojali and pipe gun were recovered from accused Salim @ Chikna, 7 bombs were recovered from Akbar along with a vojali	
PW-3	1 vojali, 1 pipe gun along with cartridges were recovered from Salim. One pipe gun & cartridges each were recovered from Akbar and Rafik. 1 vojali & 7 live bombs were recovered from Santu.	There is no label pasted upon the seized articles. So I cannot ascertain which items were recovered from which miscreants. The vojalis do not contain any label. There is also no note regarding the cartridges.
PW-4	We recovered some fire arms, bombs and vojalis.	I cannot mention which particular revolver was recovered from which accused.
PW-5	4 hand made one shoter loaded pipe gun, 2 vojalis and some bombs were recovered from their possession.	I cannot also say which items were recovered from whose possession.
PW-6	4 pipe guns with cartridges and 2 vojalis were recovered	I cannot say particulars of recovery.
PW-7	4 country made loaded revolver & 2 knives were recovered	I cannot mention details of seizure

PW-8	4 pipe guns were recovered from 4 of them and 2 vojalis were recovered along with some bombs.	Seal roping were done after coming back to PS. I cannot remember the alamsats as to which one was seized from whom.
PW-9	I heard that some things like revolver were recovered from their possession but I did not see it.	
PW-15	4 country made pipe gun, 4 cartridges, 2 vojalis, 7 bombs.	

From the evidence of witnesses could specifically disclose the exact firearm which was allegedly recovered from each particular accused person. The entire story being concocted, none of the weapons were not even produced before the Court on certain dates. The prosecution witnesses vaguely gave different number of weapons that were seized without even mentioning which of the accused was carrying which weapon.

d) Illegal Seizure Procedure:

PW-3, the Sub Inspector of Police, has deposed in his evidence that they obtained the signatures of witnesses on blank white paper. The same was corroborated by the prosecution witness who is an independent witness viz PW-11 declared hostile who stated in his cross-examination that he had put his signature on blank paper. Similarly another independent witness of the prosecution PW-14 also declared hostile stated that the police authorities requested him to put his signature on some blank paper. In fact PW-10 who is a hostile witness stated that police only wanted to know his name.

Thus, from the evidence of prosecution witness PW-3 the then Sub Inspector of Police, it is clear that the seizure was not made in accordance with the procedure enumerated in Code of Criminal Procedure and thus the same is vitiated and thus cannot be relied upon to convict the accused. It is also to be noted that PW-3 was never declared hostile and as such the testimony of PW-3 is binding on the prosecution.

e) Defective sanction under Arms Act:

The evidence of the PW-13 would show that the authority had considered only the seizure list and the statement before passing the sanction order. In the present case when the seizures themselves are not established it is extremely hard for the authority to accord sanction on the basis of such incomplete material. Furthermore, there is no reflection of application of mind as the authority had never disclosed as to which materials attracted violation of Arms Act.

f) Lack of material to show the preparation to commit dacoity:

On perusal of the language of the enactment it is quite clear that in order to convict a person of the offence under Section 399 the prosecution is bound to prove that he was making or has made preparation for committing dacoity. "Preparation" consists in devising or arranging the means or measures for the commission of the offence. In the present case there is absolutely no evidence on the record to show that any of the appellants as devising or arranging any means or measures for committing the offence. They were simply

sitting in the waiting hall. It is thus clear that the prosecution did not prove that they were making or made any preparation for committing dacoity. The appellants, therefore, cannot be convicted under Section 399 of the Code. There is no evidence and there are no circumstances on record to show that the purpose of these persons was to commit dacoity.

In order to prove the guilt under Section 402 of the Code the prosecution has to prove that the purpose of the assemblage was to commit dacoity and no other offence or for any other purpose. The mere fact that a number of persons were found together some of whom who may also have possession of fire arms, does not by itself lead to the inference that they had collected there having made preparation to commit dacoity.

The appellants in this regard relied the decision cited in Chaturi Yadav and Ors. Vs. State of Bihar reported in (1979) 3 SCC 430.

5. The Learned Advocate for the State in all fairness submitted that apart from vague assertions the prosecution failed to prove its case. The seizure was not proper and left it to the discretion of this court.
6. A circumspection of evidence of the prosecution witnesses stated as follows:-
 - i. PW-1 stated in his evidence that on 22.09.03 he was posted in Kulpi P.S. as A.S.I. of Police. On that date in the evening, he came to know from source that some miscreants were going to commit dacoity in Nischantapur market. Thereafter under the leadership of O/C of their P.S., himself, S.I. P.S. Ghosh, A.S.I. R. Chakraborty and A.S.I. B. Das

and 4/5 other Constables had been to the Rail gate of Nischantapur by a police van and seeing the police van, some boys started running and five of them could be apprehended and the rest miscreants fled away crossing the canal. Sanwar, Rafik, Akbar, Babu Sona @ Santu, Salim were apprehended by police. Vojali, pipe guns, bombs were recovered from them. They disclosed that many were assembled there for committing dacoity in Nishantapur market and they also disclosed the other names of their associates like Anwar and others. Seizure list was prepared thereon and PW-1 put his signature on the seizure list. He identified the seizure list which contained his signature which was marked as Exhibit 1/1.

- ii. During cross-examination, PW-1 deposed that they reached at the spot at about 8:30 p.m. He apprehended Akbar and Rafik but he could not say who others apprehended which accuseds. They were remaining seated on the road. He apprehended two at a distance of 10 cubits from the road. He could not say who apprehended whom. He apprehended Akbar at first and thereafter helped B. Das to apprehend Rafik. One pipe gun was seized from the possession of Akbar. Another pipe gun was also recovered from Rafik. Those alamats were not produced before the Court. At that time one train arrived at the station and at about 20/30 people were passing through that way. Alamats were seized from the accused near gumti/ghar of station.
- iii. PW-2 at the time of deposition stated he was a S.I. of police posted as Officer-in-Charge, Diamond Harbour Police Station. On 22.09.2003 he

was posted as Officer-in-Charge, Kulpi Police Station. On that date he received one telephone message to the extent that some miscreants were assembled near Nischintapur Rail Gate for committing dacoity in that area and thereafter he, A.S.I. R. Chakraborty, S.I. P.S. Ghosh, S.I. B. Das along with other force proceeded to the spot by police vehicle. They kept their vehicles at a little distance of the Nischintapur Rail Gate. They were proceeding towards the rail gate by foot. They picked up two public with them. Thereafter, they noticed that 7-8 persons started running and they could apprehend 5 of them from different sides namely Sanwar, Rafikul, Santu, Salim, Akbar. Three loaded pipe-guns were recovered from Santu, Sanwar, Rafikul, vojali and pipe-gun were recovered from accused Selim @ Chikna, 7 bombs were recovered from Akbar along with a vojali. They disclosed that they were assembled for committing dacoity in Nischintapur market. They also disclosed the other miscreants' names like Anwar Hossain and 1/2 others. PW-2 identified 6 accused persons in Court. S.I. P.S. Ghosh prepared the seizure list and PW-2 signed on it. PW-2 identified his signature marked Ext. 1/2.

- iv. During cross-examination PW-2 stated they reached at the spot at about 8/8.30 p.m. It took about 30-45 minutes to reach at the spot. They proceeded by two police vehicles. Place of occurrence would be at a distance of 50/100 yards from the Railway Station. He could not recollect the exact number of the force proceeded for that purpose on the date of incident. He could not mention who apprehended whom on

that date. About 7-8 persons were running away seeing the police. After apprehension of the accused persons, so many persons gathered there. Seizure list was prepared on the spot.

- v. PW-3 at the time of deposition stated he was a S.I. of Police and posted at Kulpi P.S. On 22.09.2003, he was also posted there in the same capacity. On this date one incident took place at about 5.30 p.m. They received a telephonic information that some miscreants assembled at Nischintapur Rail Gate for the purpose of committing dacoity. He informed the matter to Officer-in-Charge. Thereafter, Officer-in-Charge himself, PW-3, A.S.I. N. Sarkar, B. Das and R. Chakraborty and other forces proceed to that place and they saw that near the Rail Gate, some miscreants gathered and they were whispering with each other. Thereafter, they chased them and apprehended 5 accused persons namely Sanwar, Rafik, Selim, Akbar and Santu. On search one vojali, pipe-gun along with cartridges were recovered from Akbar and Rafik. One vojali and 7 live bombs were recovered from accused Santu. He prepared the seizure list on the spot. He identified his signature on the seizure list marked Ext. 1. Four revolvers with cartridge along with vojalis were produced in Court. Those were seized from the accused persons on the date of incident. Four revolvers were marked Mat. Ext. I, II, III, IV and four cartridges were marked Mat. Ext. V, VI, VII, VIII and two vojalis were marked Mat. Ext. IX and X.

7. PW-1 said the story of one pipe-gun recovered from Akbar and another from Rafique and further said those were recovered near 'Goomti' of station i.e.

the story of two pipe-guns but herein PW-2 has come with the story of 3 pipe-guns from Santu (who is acquitted), Sanwar, Rafique and 7 bombs from Akbar. Tremendous differences and discrepancies have come out from the above evidence of the two witnesses.

8. PW-2 said he got telephonic information at 5.35 P.M. about the gathering of some persons but PW-5 said they went to the rail-gate at 5.30 P.M. Unbelievable differences are coming out in the evidence of the above witnesses.
9. PW-3 also said with different story that bombs were recovered from Santu and pipe-guns were recovered from others and in cross-examination said no label was pasted upon the seized articles and for that he could not ascertain which items were recovered from which persons. He also admitted that he could not ascertain about the seized articles and could not say which items were recovered from whom. So, he is absolutely different from PW-1 and PW-2 and he also said he along with others returned to the police station at 11.45 P.M. but PW-5 said they returned to police station at 10 P.M. – two hours difference, in their evidences, PW-6 said the story of returning at 9.30 p.m. i.e. also difference of more than 2 hours.
10. PW-4 said that on 22.09.2003 they went to the rail-gate and arrested 5 persons and on search recovered fire arms and bombs and in cross-examination he said that he cannot say which item was seized from whose possession. The story of the evidence of the witnesses is absolutely different from that of others.

11. PW-5 (S.I. of Police) stated that they went to the rail-gate at 5.30 P.M. and arrested 5 persons and in cross-examination he said and admitted that he proceeded on that date at 8/8.30 P.M. and he could not say which item was recovered from whom. He admitted that no public was assembled there at that time but PW-4 said 5/7 persons were present.
12. PW-6 stated that he went to the rail-gate at 8/8.30 P.M. and arrested 5 persons but he could not say about the possession of seized goods from whom and said in cross-examination that he along with others came back at 9.30 P.M. The evidence of PW-6 is absolutely went too far from the evidence of other witnesses.
13. PW-7 stated he along with others went to the rail-gate at 5.30 p.m. and arrested 5 persons and in cross-examination said they returned to the police station at 11.00 p.m. he did not canvas any evidence which item was recovered from whom.
14. PW-8 stated he along with other police officers went to the rail-gate and arrested 5 persons and he said that he came back to police station along with others at 10 p.m. and said seizure list was required on road and sealing and roping were done in the police station. The evidence of PW-8 goes to show some doubt which is admitting by him that sealing and roping of the seized articles were done in police station which goes to show that cooked-up case was cooked sitting at the police station.
15. PW-9 stated he along with others conducted raid at 5.30 p.m. and he heard the sound 'Palao', 'Palao' and he said 4/5 persons were arrested but he could

not canvas which item was recovered from whom. This is also created a new story and doubt about the raid in day light at 5.30 p.m.

16. Certain police persons stated that they went to raid on 5.30 p.m. at the spot, some police persons said that they went to raid on 8/8.30 p.m. some police persons said that they came back to the police station at 9.30 p.m., some say at 10.30 p.m., some say at 11.45 p.m. but unfortunately the Officer-in-Charge said he got information at 5.35 p.m. about the gathering and thereafter at 8.30 p.m. they went but in the case diary the FIR says the information getting time is 5.35 p.m. As per the versions of police persons it comes to light that they went there at the spot at 5.30 p.m. before the getting of the information. The totality of the evidences go to show colourable differences.
17. PW-10 (independent witness) did not admit anything about the alleged occurrence.
18. PW-11 (independent witness) did not admit anything about the alleged occurrence and denied any signature on the seizure list.
19. PW-12 (independent witness) said that he had no knowledge about the alleged occurrence as claimed by the police persons.
20. PW-13 said that he gave sanction to the officer-in-charge.
21. PW-14 (independent witness), a fish businessman at fish market said that he was not on the spot at that time as alleged by the police and further said that on next morning he went to have his tea at the market and the police one next morning procured his signature on some black papers.

22. PW-15 (Investigating Officer) said on 22.09.2003 the case was started on the complaint of S.I. Mr. Ghosh and as per the direction of the Officer-in-Charge he was appointed as the Investigating Officer of this case. In cross-examination he said that he examined Khokon Karmakar and Kartick Bhowmick at 6.50 a.m. on 23.09.2003 which story proves that the above two witnesses were not present at the time of occurrence and it also comes to light that he did not examine the other independent witnesses.
23. Under the facts and circumstances, the prosecution has failed to establish its case beyond reasonable doubt and as such the instant criminal appeals are allowed.
24. Accordingly, the criminal appeals being CRA 581 of 2005 and CRA 730 of 2004 stand disposed of.
25. There is no order as to costs.
26. I record my appreciation for the able assistance rendered by Learned Advocate, Mr. Apalak Basu, as *Amicus Curiae* in disposing of the appeals.
27. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
28. 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.)