
(2000) 08 PAT CK 0038

In the Patna High Court

Case No : Criminal Appeal No. 1 of 1995 (R)

Asad Mian @ Akhtar Azad Mian and Others

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 24-08-2000

Acts Referred:

Penal Code, 1860 (IPC) — Section 395, 397, 412

Citation : (2001) 1 BLJR 142

Hon'ble Judges : Indu Prabha Singh, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Indu Prabha Singh, J.—All the six appellants have been convicted under Sections 395/397 of the Indian Penal Code and sentenced to undergo R.I. for eight years and also to pay a fine of Rs. 100/- each in default to further undergo R.I. for a period of one month. The appellant Nizamuddin Mian has also been convicted u/s 412 of the Indian Penal Code. No separate sentence has been passed under Sections 395 and 412 of the Indian Penal Code.

2. The prosecution case in brief is that on 7.1.1993 at 7 p.m. the informant (P.W. 9) Bhikhari Naik along with Khalasi Hassan Mian were returning from Kedar Market after unloading the rice from truck bearing registration No. BR20G-2005. It has been stated that when the truck, driven by the informant, reached near Barkatha Chatti at G.T. Road 1/2 k.m. ahead from Barkatha P.S. one person in the guise of a Chaukidar uniform stopped the truck. Thereafter, he along with 6-7 decoits boarded in the cabin of the truck forcefully. The decoits in Chaukidar uniform over-powered the driver and occupied the driver seat and began to drive the truck. Other decoits started commission of dacoity and Snatched Rs. 2000/- from the pocket of the informant. They also tortured him to hand over other cash and articles. They also looted Rs. 30/- cash and shirt and pant pieces from the Khalasi, Hassan Mian (P.W. 4). It has been alleged that Allwin wrist, watch and Rs. 15,000/- cash, the fare to the coal kept in the cabin and tape-recorder were

also looted by the miscreant. When the truck reached near Ataka Chatti the home village of the informant, the informant seeing the eminent danger tried to free from running truck and in that process he was injured by means of iron rod. It has also been alleged that the miscreants also fired upon him from country-made pistol and he became injured seriously. The informant raised alarm upon which the villagers stopped the truck, and the miscreants started fleeing away. It has been alleged that one miscreant wearing the Chaukidar's uniform was caught by the villagers after chase, who disclosed his name as accused Akhtar Azad. He also disclosed the name of his associates. It has further been alleged that informant was taken to Bagodar State Dispensary where his fardbeyan was recorded by Sri Bharat Ram. A.S.I. of Bagodar Police Station. He sent the fax fardbeyan to Officer Incharge. Barkatha P.S. for registering a case as the occurrence took place in Barkatha P.S. On receipt of the same and the arrested accused Akhtar Azad, the Officer-incharge Barkatha P.S. registered a case vide Sarkatha P.S. Case No. 3/93 against accused Akhtar Azad, and other u/s 395 of the Indian Penal Code. The former F.I.R. was drawn up. The arrested accused was forwarded in Court. The then Officer-incharge Barkatha P.S. Sri K.P. Yadav took up investigation himself and recorded the confessional statement of the arrested accused. During the investigation, the house of accused Nizamuddin Nizam Mian was searched on the confessional statement of arrested accused Akhtar Azad and the pant shirt pieces of Khalashi Hasan Mian was from the house of accused Nizamuddin Nizam Mian. Accordingly recovered search cum-seizure list was prepared at the spot. He further arrested and recorded the confessional statement of accused-personal namely Akhtar Azad, Nizamuddin Nizam Mian. The arrested accused were put on Test Identification Parade and were identified by cleaner Nasan Mian. The recovered articles were also put on Test identification and were identified by P.W. 4 Hassan Mian. After completion of investigation, charge-sheet was submitted against the accused-person under Sections 395/397 and 412 of the Indian Penal Code. On the basis of that, cognizance was taken against the accused-person and the case was committed to the Court of Sessions for trial and trial concluded as mentioned above. Appellants have pleaded not guilty and they have falsely been implicated in this case.

3. Prosecution in support of its case examined altogether 13 witnesses P.W. 1 is Bhutak Mian. P.W. 2 is Sri C.B.K. Rai, J.M. 1st Class Kodrm and P.W. 3 Sri H.N. Shukla also J.M. 1st Class Kodrma. Both of them had conducted the Test Identification Parade. P.W. 4 Hasan Miana, cleaner of the truck P.W. 5 is Bhola Sao who has seen the informant the injured condition. P.W. 6 Mahesh Prasad who is tendered witnesses. P.W. 7 is Bishnu Sao. P.W. 8 is Kailu Sao P.W. 9 is Bhikhari Naik who is the informant of the case. P.W. 10 Kaila Prasad Yadav who was posted as Officer in-charge of Barkatha at the relevant time: P.W. 11 is Md. Imamuddin who is also seizure list witness. P.W. 12 is Sakhawar Ansari who is also Seizure-list witness and P.W. 13 is a formal witness. Out of these P.Ws. 2, 3, 4, 5, 9 and 10 are material witnesses of the case.

4. P.W. 4 has stated that on 7th January, 1993, he along with driver Bhikhari Naik, the informant of this case, were returning from Kodarma market after unloading rice from truck bearing registration No. BR-20G-2005. When the truck reached near Barkatha Chatti at G.T. Road 1/2 k.m. ahead from Barkatha P.S. culprit in the guise of a Chaukikar's uniform stopped the truck and boarded in the cabin of the truck forcibly. They over powered the driver and occupied the driving seat and began to drive the truck. They also started committing decoity after torturing the driver. In course of committing decoity they looted Rs. 2000/- cash from the pocket of the informant and Rs. 15,000/- from the cabin which was kept for purchasing coal. They also looted his shirt and pant pieces which were purchased by him at Varanasi. A wrist-watch and tape recorder of the truck was also looted by the dacoits. He has stated that when the truck reached near Ataka Chatti, the home village of the informant, the informant tried to escape from running truck and in that process, he was injured by the dacoits by means of iron rod and fire-arms. He has stated that the driver became seriously injured and he was taken to Bagodar State Dispensary. He has stated that he was present at the time of occurrence in the aforesaid truck. He identified accused Mustaque Mian Charka @ Shamim Mian, Nizamuddin @ Mizam Mian Jogeshwar Yadav @ Jaika Yadav in test identification which was conducted by P.Ws. 2 and 3. However, he also stated that before the TIP, he saw the appellants at the police station and was taken to TIP by the police officer. He also stated that he identified the recovered articles in the Test Identification Parade to be his own looted property. He also identified accused Jahoor Mian in the Court as one of the participant of the occurrence.

5. P.W. 9 Bhikhari Naik is the informant of this case. He has also supported the entire case of the prosecution. He has also proved his signature on the fardbayan which was made in Bagodar State Dispensary which has been marked Ext. 2. He has not identified the accused-person in Court.

6. P.W. 10, Kailash Prasad Yadav has stated that on 7.1.1993, he was posted as Officer-Incharge of Barkatha P.S., on that date, he received the fardbayan recorded by A.S.I. Bharat Ram of Bagodar P.S. along with one suspect who was arrested at the spot. On the basis of the aforesaid Fardbayan, he draw up a formal F.I.R. Ext. He took up investigation and recorded the confessional statement of accused Akhtar Mian @ Asad. He has stated that on his confessional statement, the name of other accused-persons came in light and arrested the rest of accused-persons. He has stated that during the course of the investigation, the house of the accused Nizamuddin @ Nizam Mian was searched in presence of two independent witnesses and looted articles of P.W. 4 were recovered. The seizure list witnesses were examined by P.Ws. 11 and 12. The seizure list has been marked Ext. 6 and signature on the seizure list witness was marked as Ext. 6/1.

7. The learned Counsel for the appellants submitted that the appellant Asad @ Mian Akhtar Azad Mian was apprehended by the villagers but the villagers were

not examined. So non-examination of the villagers has become fatal to the case. It has been stated that in the F.I.R., a person who was arrested-disclosed the names of the four accused and these accused-persons have not been charge-sheeted. He has stated that from the evidence of P.W. 4 it appears that the accused-persons were shown to him by the police before T.I. Parade was conducted by the P.Ws. 2 and 3 and the Court below has not discussed the evidence of the P.W. 4 that accused-ersons were shown to him before the T.I. Parade was conducted.

8. As regards the submission of the learned Counsel, the villagers were not examined who apprehended the appellants Akhtar and Non-examination of the villagers, has become fatal to the case. It is true that due to non-examination of the villagers the case of the prosecution has become weak and this is a lacuna on the part of the police, who investigated the case. In this cases, F.I.R. was drawn up against the persons whose name were disclosed by the appellant Akhtar However, on details examination and on the statement of Akhtar only the police recovered some material which were looted. The charge-sheet was submitted against the persons so identified since nothing was found against the four persons who were named in the F.I.R. even though their names were dislosed at the first instance. Thus how investigation agency will falsely implicate them even without any evidence. As such, this plea of the earned Counsel that the persons whose names were disclosed by apprehended appellant Akhtar has no force. It has also been submitted by the earned Counsel for the appellants that P.W. 4 in para-19 of his deposition has stated that he saw the appellant at the police station and then, he was taken into T.I. Parade along with the Sub-Inspector of police. In para-21, he has also stated that at the time of occurrence dacoits have ordered to keep up his head down-wounds and he along with others on the truck were afraid and were nerves and also light inside the truck was not enough as he could not see the dacoits in the truck. I find that the contention of the earned Counsel for the appellants has force that the identification by this appellant cannot be relied upon.

9. From perusal of the deposition of the P.Ws. 2 and 3 who conducted T.I. Parade on 25.2.1993 and 15.1.1993 respectively, it appears that P.W. 4 has identified the appellants Mushtaque Mian and Jageshwar Yadav @ Jika Yadav and PW. 4 has also identified Nizamuddin and Chakra. In view of the poor lighting at the time of occurrence and also admission of P.W 4 that he was not in a position to see the dacoity due to non-availability of light and his statement that accused-persons were shown to him by the police before T.I. Parade was conducted. Identification of the appellants by this witness has become doubtful.

10. In this case, out of 13 witnesses, P.W. 4 and P.W. 9 have stated in their deposition that he could not identify any of the miscreants who boarded on the truck. P.W. 9 has stated that he was not called for taking part in T.I. Parade and as such, his evidence has no value as per the identification of the appellant is concerned. However, P.W. 5 the witness on the factum of occurrence has been

declared hostile, nothing could be gathered by the prosecution from his evidence. However, he has stated that he does not remember the villagers who were chasing the dacoits. P.W. 7 has stated that on the date and time of occurrence, the truck in a very high speed came and stopped near his tea-steel. He has stated that the driver of the truck was injured and neighbours took the driver to Bagodar Hospital for his treatment. In his cross-examination, he has stated that about 5 to 7 dacoits jumped out from the truck fled away. P.W. 8 has stated more or less same version as stated by P.W. 7. They have also stated that they did not identify any of the decoits.

11. In this case, practically there no identification against the appellants except appellants Akhtar who was identified by P.W. 7, who has stated that one of the dacoits who was apprehended by the villagers was Akhtar. As far as the recovery of the articles is concerned, it has not been supported by the seizure list witnesses P.Ws. 11 and 12 and also not by the witness of T.I. chart though P.W. 11 and 12 had accepted signature and T.I. on seizure list. But, they have specifically stated that nothing was recorded in their presence even T.I. chart witness P.W. 13 has accepted his signature on the chart but denied to have knowledge what was written on the T.I. chart. Officer incharge has stated that some clothes were recovered from the appellants Nizamuddin for which seizure list was prepared. He also stated that recovered articles were identified by P.W. 4. On this point, the learned Counsel has submitted that clothes were recovered from the possession of the Nizamuddin is of common nature and readily available in the market and also since without any special mark on it could not be safely said that these were the articles looted from truck and belonged to P.W. 4. Officer Incharge in his cross-examination has also stated that such clothes were available in the market and there was no specific mark on the clothes which were recovered from the house of Nizamuddin. He has also stated that the informant has not described the colour and design of clothes which were looted from the truck. Such recovery of looted recovery articles from the house of Nizam Mian @ Nizamuddin has also become doubtful. Therefore, the appellant Nizam Mian Nizamuddin cannot be held guilty u/s 412 of the Indian Penal Code. As far as the involvement of the appellants in commission of the dacoity is concerned, their identification has not been proved beyond all reasonable doubts and the appellants 2 to 6 (Mustaq Mian), Zahoor Alam @ Zahoor Mian, Charkha @ Shamim Mian Shamim, Nizam Mian @ Nizamuddin and Jageshwar Yadav Jaika Yadav) deserve acquittal on benefit of doubt and they are accordingly acquitted of the charges levelled against them. Accordingly, this appeal is allowed and the conviction and sentence passed by the Court below against the appellants No. 2 to 6 is set aside. They are discharged from the liabilities of their bail-bonds. However, since appellant No. 1 Asad Mian @ Akhtar Mian was apprehended on the spot and was named in the F.I.R. also as such, his case stands on different footing than others appellants. His conviction and sentence u/s 395 is maintained. However, there is no specific overt attributed to him about assaulting the injured driver P.W. 9, he deserves acquittal u/s 397 of the Indian Penal Code.

Accordingly, he is acquitted from the charges u/s 397 of the Indian Penal Code. Now coming to the question of the sentence as the appellant has remained in jail for about two years, I feel that ends of justice will be met if the sentence of this appellant, Asad Mian @ AkhtarMian is reduced to the period already undergone in jail.

12. Accordingly, this appeal is allowed as far as appellants, Mustaq Mian, Zahoor Alam @ Zahoor Mian, Charkha @ Shamim Mian @ Shamim, Nizam Mian @ Nizamuddin and Jageshwar Yadav @ Jaika Yadav are concerned. As far as appellant Asad Mian @ Akhtar Azad Mian is concerned, his appeal is partly allowed with the modification in conviction and sentence as mentioned above. Appeal allowed.