

(2014) 01 PAT CK 0076

In the Patna High Court

Case No : Criminal Appeal (SJ) No. 685 of 2013

Bhim Mahton

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 15-01-2014

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 303, 304
Penal Code, 1860 (IPC) — Section 394, 397, 411, 412

Citation : (2014) 01 PAT CK 0076

Hon'ble Judges : Aditya Kumar Trivedi, J

Bench : Single Bench

Advocate : Ajit Kumar Ojha and Mrs. Nutan Mishra, for the Appellant; S.N. Prasad, APP, for the Respondent

Final Decision : Allowed

Judgement

Aditya Kumar Trivedi, J.—Sole appellant Bhim Mahton who has been found guilty for an offence punishable u/s 394 IPC and directed to undergo R.I. for 10 years as well as also fined Rs. 10,000/-, u/s 397 IPC and sentenced to undergo R.I. for 7 years, u/s 411 IPC sentenced to undergo R.I. for 3 years as well as fined Rs. 5000/-, no separate sentence u/s 27 of the Arms Act with a further direction to run the sentences concurrently vide judgment of conviction dated 29.08.2013 and sentence dated 06.09.2013 passed by Ad hoc Additional Sessions Judge, IVth, Begusarai in Sessions Trial No. 343 of 2010 has challenged under present appeal. PW-2, Birendera Kumar while was admitted at the clinic of Dr. Ashok Sharma (PW-8) on 15.04.2008 at about 08:00 P.M. gave his fardbeyan disclosing therein that on the same day at about 11:20 A.M. he along with his master Anjani gone to deposit cash appertaining to Rs. 5,82,000/- were intercepted by criminals who tried to snatch bag containing Rs. 3,55,000/- and having faced resistance at his end, one of them shot at and succeeded in snatching of bag containing Rs. 3,55,000/- and then all of them flew there from over motorcycle. He had further disclosed the physical feature of miscreants who had snatched the

amount being black as well as dwarf.

2. On the basis of the aforesaid fardbeyan, Begusarai P.S. Case No. 89 of 2008 was registered where upon investigation proceeded. It is evident from the lower court record that earlier appellant Bhim Mahton was apprehended along with motorcycle cash appertaining Rs. 15,000/- with a mobile set and subsequently thereof was put up on T.I. Parade wherein identified. Charge sheet was submitted against him and on the basis thereof Sessions Trial No. 343 of 2010 commenced after commitment.

3. While keeping the investigation pending against other co-accused one Bechan Ram was apprehended who was also put on T.I. Parade and was identified whereupon charge sheet was also submitted against him and on the basis thereof, Sessions Trial No. 530 of 2010 was registered. It is also evident that after examination of Anjani in both the sessions trial, Sessions Trial No. 530 of 2010 was amalgamated with Sessions Trial No. 343 of 2010 and accordingly, both the accused were prosecuted under Sessions Trial No. 530 of 2010 which ultimately concluded in convicting the appellant while Bechan Ram was acquitted.

4. After hearing the learned counsel for the appellant as well as learned Additional Public Prosecutor along with perusal of lower court record, it is apparent that learned trial court had conducted the trial in most cryptic perfunctory manner. It is also evident from the lower court record that PW-1 Anjani was examined in Sessions Trial No. 343 of 2010 on 27.05.2010 but his cross-examination was deferred and on subsequent date that means to say on 18.06.2010 the witness was discharged as none was to represent and cross-examine PW-1, Anjani. On subsequent date that means to say on 07.07.2010 a prayer was made on behalf of Bhim Mahton to provide counsel to defend him in terms of Section 304 Cr.P.C. which was accepted by the learned lower court and Sri Jai Nendra Kumar was appointed. In the aforesaid background, the examination of PW-1 and discharge thereof in absence of having the appellant properly defended, completely over looked by the learned trial court. After all, in accordance with Section 303 of the Cr.P.C. the accused has got right to be properly defended and in accordance with Section 304 of the Cr.P.C., the counsel at the State expense is to be provided in case the accused is found undefended.

5. The aforesaid PW-1 was also examined as PW-1 in Sessions Trial No. 530/2010 before amalgamation and after going through his evidence, it is apparent from his examination-in-chief that he had identified both the accused that means to say appellant Bhim Mahton as well as Bechan Ram. It is surprising how presence of Bhim Mahton was in connection with Sessions Trial No. 530 of 2010 before amalgamation.

6. It is also evident from the lower court record that not only the witnesses more particularly the informant as well as I.O. PW-7 kept mum with regard to conduction of T.I. Parade of both the accused during course of investigation, the learned trial court also failed to perceive the same in spite of having the T.I.

chart on record as well as presence of Magistrate.

7. In the background of persisting infirmities, now the material aspect of the case has to be taken up. From the lower court record, it is evident that altogether nine PWs have been examined out of whom PW-1 is Anjani, PW-2 is Shailendra Kumar Singh, PW-3 is Manish Kumar, PW-4 is Birendra Kumar, PW-5 is Ram Bilash Singh, PW-6 is Ajit Singh, PW-7 is Dharendra Deo Rai, PW-8 is Dr. Ashok Kumar Sharma, PW-9 is Bablu Paswan. So far status of witnesses is concerned, PW-5 is hearsay witness, PW-6 is the witness of seizure list, PW-9 is formal in nature. PW-8 is the doctor. PW-7 is I.O. PW-1 to 4 are the witnesses of material point.

8. Evidence of PW-1 as indicated above was recorded by the learned lower court while he was undefended and on account thereof, the evidence of PW-1 happens to be inadmissible in the eye of law for want of cross-examination on account of lapse on the part of the trial court. PW-2, PW-3, PW-4 happens to be the employee of PW-1. From the fardbeyan of Birendra itself, it is evident that there happens to be absence of PW-2 and PW-3. It is also evident from the fardbeyan that name of culprit has not been divulged therein. In the aforesaid background when the evidences are taken together, it is evident that witness No. 2, Shailendra Kumar Singh have supported the case of the prosecution as well as also named the appellant whom he identified in court to be assailant of Birendra Kumar and had snatched the money. His attention was drawn towards his previous statement under para-4 and same is found corroborated with evidence of PW-7 (I.O.) para-9 wherein he had not stated before the police at an earlier occasion regarding his presence at the place of occurrence at the time of occurrence.

9. PW-3 in similar way had stated and named the appellant to be an assailant as well as the person who snatched away bag containing Rs. 3,55,000/- however was not an eye witness of occurrence as per his initial version as is evident from para-2 and is found corroborated with the evidence of PW-7 para-9. Therefore, these two witnesses who were not an eye witness at the initial stage have turned their side during course of trial to be an eye witness to the occurrence.

10. Now coming to the evidence of PW-4, Birendra. Although during course of investigation he had identified the appellant Bhim Mahton as well as Bechan Ram (since acquitted) during T.I. parade. However, during course of evidence he shifted there from named the appellant and identified the appellant in dock. He had also stated that during course of occurrence people were saying that it is Bhim Mahton who is committing the offence and for that his attention was drawn up. Therefore, the relevancy of evidence of the material witness PW-2, PW-3 and PW-4 with regard to identification by name of the appellant Bhim Mahton is not found above board. Side by side, shifting from the basic theme of T.I.P. to identify the culprit by name is another ground which irked the judicial conscience.

11. Now there arose curiousness over relevancy of evidence of three PWs,

namely, PW-2, PW-3 and PW-4 on account of identifying the appellant in court. Because of the fact that the prosecution did not insist upon T.I. parade by withholding the same and in likewise manner disclosure of name by the PWs for the first time in court appears to be accidental as well as pestilent, then in that event the impact of identification before the court for the first time during course of trial happens to be umbrageous. However, its affiliation is to be perceived in the background of the nature of evidence so adduced during trial. From the evidence of PW-7 (I.O.) as referred above. PW-2 and PW-3 never shown themselves to be an eye witness to occurrence. Now coming to the evidence of PW-4, the informant, it is evident that he had also fallen under same path. Withdrawing himself from claiming identification of appellant along with Bechan Ram (since acquitted) in course of investigation under T.I. parade, opted to name and identify the appellant in court while had exonerated the Bechan Ram.

12. The law is very clear on this score. Identification for the first time in court happens to be substantial evidence but the same has to be tested on the score of reliability. If a witness identifies the accused in court for the first time, the probative value of such uncorroborated evidence becomes, minimal so much so that it becomes as a rule of prudence and not law, unsafe to rely on such a piece of evidence. In the case of *Vaikuntam Chandrappa and Others Vs. State of Andhra Pradesh*, , it has been observed that "the substantive evidence of a witness is his statement in court but the purpose of test identification is to test that evidence and the safe rule is that the sworn testimony of witnesses in court as to the identity of the accused who are stranger to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding or any other evidence."

13. As stated above it is apparent that the reason best known to the prosecution, neither PW-4 (informant) nor PW-7 the I.O. stick over conduction, identification of the appellant during course of T.I. parade at the other hand they shifted there from and deposed disclosing name of appellant and identifying him in court in stray manner without having corroboration from any end.

14. Now coming to applicability of Section 412 of the IPC, it is evident that Rs. 15,000/- was recovered from the possession of appellant during course of his apprehension but again the PW-7, Investigation Officer, as is evident from his evidence, failed to collect relevant evidence to connect the seized cash being a booty nor any kind of connecting evidence has been produced during trial.

15. Even the evidence of PW-8, the doctor is not going to improve the case of the prosecution save and except observing that PW-4 was admitted at his clinic in injured condition on account of sustaining of firearm injury. Thus, having minute and analytical approach of the evidence available on the record, the conviction and sentence recorded by the learned trial court is found unsustainable in the eye of law. Consequent thereupon is set aside. Appeal is allowed. Appellant is under custody hence directed to be released forthwith, if not, wanted in any other case.