

(1999) 07 PAT CK 0108

In the Patna High Court

Case No : Criminal Appeal No. 90, 93, 135 and 159 of 1989

Kaushal Kumar Pasi and Another, Kamakhya Narayan Singh, APPELLANT
Kedar Bari and Sulaiman Mian

Vs

The State of Bihar RESPONDENT

Date of Decision : 01-07-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Evidence Act, 1872 — Section 138
Penal Code, 1860 (IPC) — Section 395, 412

Citation : (1999) 2 BLJR 1572

Hon'ble Judges : P.K. Deb, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

P.K. Deb, J.—All these appeals have been heard together as they arise out of the common judgment of conviction and sentence in Sessions Trial No. 216 of 1987 by the then 8th Additional Sessions Judge, Arrah, in the district of Bhojpur whereby and where under all the accused-appellants have been convicted under Sections 395/412 of the Indian Penal Code and sentenced to rigorous imprisonment for ten years each u/s 395 of the Indian Penal Code but no separate sentence was awarded u/s 412 of the Indian Penal Code.

2. Tarkeshwar Pandey Tikulihar (P.W. 5) lodged an F.I.R. on 7.10.86 at about 11-30 a.m. to the effect that in the last light i.e., on 6.10.86 at about 11-30 p.m. at his residence situated at village Farna P.S. Barhera when he was sleeping along with his wife all on a sudden about ten dacoits entered in the house and on the point of gun he was asked to deliver the bunch of keys. Out of fear he gave then the bunch of keys. One of the dacoits armed with gun and another with Bhojali remained in guard of the informant and his wife and rests searched out the articles from the house. A lantern was burning in the house and torch light was flashed by the accused persons in search of the booties. According to the informant, he could see the face of the dacoits in the light of the lantern and

flash of torch of the accused persons. The dacoits looted bundle of clothes, a box containing utensils, one chain and some other ornaments. Dacoity was also committed in the adjacent house belonging to his elder brother Paras Nath Pandey Tikulihar (P.W. 1) and the articles worth Rs. 7,000 to Rs. 8,000 had also been taken away from that house. When the dacoity was finished and the dacoits were ready to flee away the informant and his family members raised their voice and then the villagers rushed to the place of occurrence. On the basis of the fardbeyan Barhera P.S. case No. 149/86 was registered u/s 395 of the Indian Penal Code against the unknown. On the very same day i.e. on 7.10.86 at about 9 a.m. one Ram Janam Bhagat son of Bajrangi Bhagat gave his fardbeyan before Arrah Town police station that early in the morning when he had gone to bank of Ganges to case himself he saw some persons carrying some bundle of clothes and they were going in a very suspicious manner. He asked whereabouts of those persons, at this seven or nine persons fled away leaving bundle of clothes. The informant and other persons chased and caught two of them, namely, Suleman Mian and Kedar Bari, Those two persons were handed over to Arrah Town police station along with bundle of clothes. Arrah police station forwarded the case to Barhera police station for entry and investigation. Both these cases were taken up together for the purpose of investigation and it could be found that the bundle of clothes which were recovered from the possession of the dacoits, some of whom fled away and two could be caught were the booties of the present dacoity and those booties were identified by the informant party. T.I.P. was held twice as Kedar Bari and Suleman named other accused persons who could be caught on subsequent dates. In the T.I.P. the accused appellants have been identified. Police after investigation submitted charge-sheet u/s 395/412 of the Indian Penal Code. On being committed to the Court of Sessions, charges were framed against all the accused-appellants on 28.7.1987. under some Sections of the Indian Penal Code. When the charges were read over and explained to the accused-appellants they pleaded guilty.

3. Prosecution side in total examined 14 witnesses although there were in total 24 charge-sheeted witnesses. Out of these 14 witnesses 5 had been tendered, namely, P.W. 6 to P.W. 9 and P.W. 11. P.W. 14 is the formal witness. P.W. 12 and P.W. 13 are the judicial Magistrates who held Test Identification Parade in Arrah Jail. Others were the witnesses of the occurrence. Investigating Officer has not been examined in the case.

4. Learned Counsel for the appellants has argued the case regarding their individual Conviction but I would take up the case of all the accused-appellants at a time and would mention the submissions of the learned Counsel for the individual appellants as and when necessary. The consistent story of the inmates of the informant is that in the light of the burning lantern and the flashing of torches by the dacoits for searching the booties of dacoity rather articles in the house the dacoits could be identified. The means of reconviction i.e. the lantern had not been seized by the Investigating Officer nor the torches of the accused-appellants i.e. the dacoits had also not been sized and much argument has been

placed by the Counsel for the accused-appellants of non-production and non-seizing the means of recognition and according to them, this alone shall be fatal to the prosecution story. This point has been considered by the learned Sessions Judge also in the impugned judgment. Only because the investigating agency has committed some error, on that alone, it cannot be said that the prosecution story should fall. The investigation officer has not also been examined in the case as is found from the records but he was attempted to be examined from the side of the prosecution and several adjournments were taken but ultimately he could not be produced and examined. In my view also non-seizure of the means of recognition or non-production of the same in the Court does not make the prosecution case disbelievable when it appears that the prosecution witnesses could be able to identify the accused-persons during the course of T.I.P. not by one but by several witnesses. Two of the accused persons were caught red-handed by P.W. 10 and the villagers at far away place being chased on the next day of the occurrence in the morning hours and also being identified along with the booties. The informant party were not knowing as to who were caught at the instance of P.W. 10 but they had been identified along with their specific actions during the course of dacoity. So this point raised from the side of the defence Counsel has got no much relevance. Out of the 14 P.Ws. examined in the case, P.Ws. 6, 7, 8, 9 and 11 are tenders witnesses. It has become the trend in almost each and every criminal case from the prosecution side in the State of Bihar to tender some of the witnesses without examining them in chief and left for the purpose of cross-examination. This is against the provisions of Section 138 of the Evidence Act which states that after examination is being made in chief then they are left for cross-examination by the adverse party.

5. After the amendment of Criminal Procedure Code there remains no scope of committal proceeding. As such there is no evidence recorded on oath before any Court of the witnesses for the prosecution. There might have been some substance under the old Code to get the witnesses examined in the committal Court tendered for the purpose of cross-examination as some evidence was already there on oath on record. But after committal proceeding has been abolished there is no scope for tendering of any witness for the purpose of cross-examination. Practically, such tendering of witnesses means that those witnesses are being withheld by the prosecution and this practice should be abandoned. Only to show that the prosecution has not withheld any witnesses, some of the witnesses cannot be tendered in the way it has been done in criminal trials in the State of Bihar, Long back in the year 1995 Apex Court has observed so as reported in Sukhwant Singh Vs. State of Punjab, , but uptil-now the practice has not been abandoned and the same is going on in full force. It is made clear that procedure adopted is totally illegal and inoperative in the eye of law. In the present case, it appears that the witnesses who have been tendered are not the vital witnesses and even if their tendering is considered to be withheld then also the same does not affect the prosecution case. When tendering is made then it is

supposed that the defence are to cross-examine for the purpose of verifying statement made u/s 161 of the Code of Criminal Procedure before the investigating agency, which was supplied to the defence, but the statement recorded u/s 161 of the Code of Criminal Procedure has got no substantive value and can be used only for the purpose of corroboration and contradiction. That too if the same is being proved by the investigating officer. But I have already held that in the present case even if the tendered witnesses are held to be withheld that has not affected the prosecution case nor prejudicial to the defence. The vital witnesses are P.W. 1 Paras Nath, brother of the informant, P.W. 2 Ramesh Pandey is the son of P.W. 1, P.W. 3 Parwati Devi, wife of the informant, P.W. 4 Chinta Devi wife of P.W. 1 Paras Nath, P.W. 5 is Tarakeshwar Pandey who is the informant. They are the inhabitants of the house where the dacoity was committed. They have supported the case of the dacoity and of identification of the dacoits during the course of dacoity by face in one and unequivocal voice and others also identified the accused persons during the course of T.I.P. The accused-appellants have been identified not only by some P.Ws. but by almost all the P.Ws. as mentioned above. The veracity of the identification could be found to be believable when some of the P.Ws. have identified some dacoits while some are being done by some other P.Ws. This shaws that there was no pre-concert amongst the P.Ws. or the investigating agency for the purpose of identification.

6. It was strenuously argued that some defence witnesses have also been examined for and on behalf of the accused-appellants, Kamakhya Singh, to the effect that the accused-appellants were shown to be witnesses before their identification formally before the Magistrate but except such vague statement no specific evidence is there to that effect. It was stated by D.W. that Kamakhya Singh was arrested on 7.10.1986 itself but he was produced on 10.10.86 and he was kept in the police custody for getting him identified by the prosecution witnesses. But when such suggestions were put to some of the prosecution witnesses the same had been denied. Prosecution witnesses have been given dates and times when they had visited the jail and the police station for the purpose of identification of the accused-persons and of the articles. P.W. 8, a tendered witness, stated that he himself deals in stolen property but this statement does not affect the prosecution case in no way because he is not a vital witness for the purpose of identification of the articles or the dacoits.

7. Much stress has been given by the learned defence Counsel regarding the T.I. chart prepared by P.W. 12 and P.W. 13. P.W. 13 held T.I.P. on 18.10.1986 i.e. within ten days of arrest of Kadar Bari, Suleman and Kamakhiya Narain. Other dacoits were arrested on subsequent days and as such delay was caused in holding the T.I.P. by P.W. 12 on 6.12.1986. In the T.I. chart (Ext. 1) specific actions were attributed to the identified dacoits at the time of commission of dacoity but the same is silent in respect of Ext. 2 T.I. chart which was prepared by P.W. 13. In that way there are some laches of the Magistrate concerned in not mentioning the specific actions of the identified dacoits but it appears that in cross-examination of P.W. 13 no much stress has been given on this point. Only

at the time of argument before this Court the point has been raised. Another point has been urged from the side of the defence Counsel that some of the witnesses stated about the concealing of their face i.e. Concealing of the face of the dacoits by wrapping with clothes but some have not stated so. It was not in evidence that the faces of the dacoits were totally wrapped. No specific cross-examination was also there. Rather witness have stated stature of the dacoits by which they could be able to identify them in course of dacoity and also by face. It has also been stated that the booties of dacoity which were seized and identified had not been produced in the Court. The informant party (Tikulihar) has stated that they used to sell clothes and ready-made garments from door to door and in the local market and they have admitted that after the clothes were made over to them they had already sold the same in the process of their business. It was also observed by the learned Sessions Judge that being poor man it cannot be accepted that informant party shall kept those articles for producing before the Court when they are to live on sale of such articles. The first identification parade was held on 18.10.86 in the jail premises while T.I. regarding articles were held on 28.10.86 in the police station. Thus there was no occasion of the informant party to visit the police station prior to 28.10.86 for getting the accused-appellants identified. It is also stated by referring to the order-sheet of the Court below that before the T.I.P. was held, the accused persons were remanded in the Court by producing in the Court. But no cross-examination is there that on the thus dates any of the informant-party was present in the Court. There was no scope also of such presence of the informant party because it is not a case that the accused-appellants have been implicated on the basis of enmity rather the informant party from the very beginning stated that they did not know accused persons and to be identified at the time of occurrence and then identified before the Magistrate in the jail. Then an argument has been placed referring to Rule 236 of the Bihar Police Manual stating that the instructions given for the TIP. have not been properly complied with. This was done on the plea that accused Kamakhiya Narain Singh had brown cat eyes and it has not been mentioned in the T.I. chart that similar persons with cat eyes had also been mixed up for the purpose of identification. It appears that when this question was put to the Magistrate concerned then he went in the dock and after close scrutiny he could find Kamakhiya Narain having cat eyes. Thus it was rightly held by the Sessions Judge that cat eyes of Kamakhiya Narain is not a special feature by which he could be easily distinguishable from common persons for cat eyes. So even if presence of such persons with cat eyes have not been intermingled during the course of TIP. The same has not made T.I.P. had in the eye of law. Regarding delay in holding the T.I.P. 1972 (SC) 283 Hasib v. State of Bihar, and 1998 CLJ 1072 Badloo v. State of U.P. and 1588 Rajveer v. State of U.P. have been referred to. The facts are totally different. In the present case practically there was no much delay in holding the T.I.P. The second T.I.P. was held on a later date because of late arrest of some of the accused persons. Although 24 witnesses have been charge-sheeted but out of them only 14 have been examined. That too some have been tendered as already mentioned above and for non-

examination of other witnesses much objection has been raised from the side of the Counsel for the appellants by referring to 1973 (SC) 926 Rameshwar and Anr. v. State of U.P. All the vital witnesses necessary for adjudication of the criminal case have been examined from the side of the prosecution. On same point although several witnesses were there, but some had not been produced. It is also not necessary as has also been observed by the Apex Court in very many cases that on some point stereotyped evidences should not be brought again and again to the much consumption of Court's time.

8. On consideration of all the matters I find that there is no force in the appeals regarding conviction arrived at by the learned Court below. On independent scrutiny of the evidence on record I am in total agreement with the conviction arrived at by the learned Sessions Judge. The individual witnesses have not been discussed in this appellate judgment as those have been done very credibly by the learned Sessions Judge and I do agree with him. All the accused appellants have been convicted u/s 395 of the Indian Penal Code and also u/s 412 of the Indian Penal Code although specific evidence u/s 412 of the Indian Penal Code is against Suleman and Kedar Bari alone. But as no sentence has been imposed for the offence u/s 412 of the Indian Penal Code I am not considering that matter in the appellate judgment. For the offence u/s 395 of the Indian Penal Code each of the accused-appellants have been sentenced to ten years rigorous imprisonment. Considering the dacoity as committed in a poor man's house and that the accused-appellants had no previous antecedents of committing such offence, I feel that when long one and half decade has passed in the criminal trial and the accused appellants have suffered both mentally, physically and financially too, the ends of justice would suffice if the sentence is minimised to three years rigorous imprisonment each which I do accordingly. The period undergone shall be set off from the sentence awarded.

9. In the result, the appeal is dismissed with the modification in the sentence alone as mentioned above and the accused-appellants are hereby directed to surrender before the trial Court within a period of four weeks from this date and in default their bail bonds shall be cancelled and all coercive steps should be taken against them to bring them to book to serve the sentence.