
(2009) 11 JH CK 0040

In the Jharkhand High Court

Case No : Criminal Appeal (S.J) No's. 1275 and 1374 of 2006

Laltu Sardar and Others

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision : 05-11-2009

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 395, 397

Citation : (2010) CriLJ 2955

Hon'ble Judges : R.R. Prasad, J

Bench : Single Bench

Advocate : Ananda Sen, for the Appellant; Jagarnath Mahato and Tapas Roy, for the Respondent

Judgement

R.R. Prasad, J.—Both these appeals arising out of the same impugned judgment were heard together and are being disposed of by this common judgment.

2. These appeals are directed against the judgment of conviction and order of sentence passed by Additional Sessions Judge-cum-FTC, Seraikella in Sessions Trial No. 75 of 2004 whereby and whereunder the appellants Sushen Kaibarta and Sumanto Tanti on being found guilty for an offence under Sections 395 and 397 of the Indian Penal Code and also u/s 27 of the Arms Act were sentenced to undergo rigorous imprisonment for ten years and seven years respectively for the offence under Sections 395 and 397 of the Indian Penal Code. They were also sentenced to pay fine of Rs. 1000/-. Further they were sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 1000/- for an offence u/s 27 of the Arms Act and in default to undergo simple imprisonment for five months. Both the sentences were ordered to run concurrently whereas other appellants, namely, Laltu Sardar, Gandhi Modi and Mano Sardar on being found guilty for an offence u/s 395 of the Indian Penal Code were sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs. 1000/-.

3. The case of the prosecution is that on 27.2.2004 while the informant Jhari Lal Soni (P.W.2) was returning his house from Sini Market along with his brother Ravindra Nath Soni (P.W.3) on a Motor Cycle driven by his brother and reached at about 9.15 p.m. near Krishnapur Nala, they were accosted by five persons in the way. Of them, two were holding firearms, who asked them to stop but Ravindra Nath Soni (P.W.3) instead of stopping accelerated the speed of the Motor Cycle but in the meantime, one of them fired shot which hit on the wrist of the left hand of Ravindra Nath Soni (P.W.3), as a result of which they fell down from the Motor Cycle and then again tried to flee from there but at the same time another miscreant fired shot which hit on the left hand of Ravindra Nath Soni (P.W.3). In spite of that, they fled towards village by raising alarm. On hearing alarm, villagers by the time came over there the miscreants fled away by taking the Motor Cycle. When the villagers assembled, they rushed in the same direction in which accused persons had fled and after going to some distance, they found the Motor Cycle lying behind the bush which was recovered. Thereafter the injured Ravindra Nath Soni (P.W.3) was taken to Seraikella Sub-Divisional Hospital where Officer-in-Charge of Seraikella Police Station came at about 1 a.m. in the night and recorded Fardbeyan (Ext.1) of Jhari Lal Soni (P.W.2) wherein he stated that he could identify two miscreants, namely, Sumanto Tanti and Mano Sardar. Upon which a case was registered and the investigation was taken by Narayan Das (P.W.8), who received information at about 2.45 a.m. while coming to the place of occurrence that miscreants have assembled in the house of Mano Sardar. Accordingly, he along with other police officials raided the house of Mano Sardar where they found four persons to whom the informant Jhari Lal Soni (P.W.2) who had also accompanied them identified them as the culprits, who had committed offence and the miscreants disclosed their name as Mano Sardar, Sushen Kaiberta, Laltu Sardar and Gandhi Modi. On personal search being made, Sushen Kaiberta was found in possession of a loaded pistol which was seized under seizure list. Thereafter all the apprehended persons confessed their guilt which were reduced in writing.

4. In course of investigation, the injured Ravindra Nath Soni (P.W.3) on being admitted to Seraikella Sub-Divisional Hospital was examined by Dr. Viva Soren (P.W.7), who found gunshot injuries over the left forearm and palm. The said injury report has been proved as Ext.4.

5. It appears that the injured on being referred to TMH for further treatment was examined by Dr. Nitya Nand Jha (P.W.6), who also found the gunshot injuries on the left forearm and left upper arm and accordingly, issued injury report (Ext.3).

6. After completion of investigation, the police submitted charge sheet against the appellants, upon which cognizance of the offences was taken and in due course, when the case was committed to the court of sessions, charges were framed to which the appellants pleaded not guilty and claimed to be tried.

7. The prosecution in order to prove the case examined as many as eight witnesses. Of them, P.W.2, Jhari Lal Soni is the informant and P.W.3, Ravindra

Nath Soni is the injured, who supported their case that all the five miscreants accosted them in the way when they were returning home from Sini Market. Two of them caused injury to Ravindra Nath Soni (P.W.3) and then took away the Motor Cycle. Both the witnesses identified all the five accused persons as the miscreants, who had participated in the occurrence. P.W.1, Harilal Soni is the brother of the informant Jhari Lal Soni (P.W.2), who when was informed by the informant came to the place of occurrence and took the injured along with others to Hospital. He was told by his brother that he had identified two of them, namely, Sumanta Tanti and Mano Sardar. Other witnesses P.W.4 Ramesh Mahato and P.W.5 Lalka Mahato have been declared hostile.

8. The trial court having found the testimonies of the witnesses trustworthy did find all the appellants guilty and accordingly, recorded the judgment of conviction and order of sentence as aforesaid.

9. Learned Counsel appearing for the appellants submits that as per the fardebayan of the informant, he could identify only Sumanta Tanti and Mano Sardar and, therefore, the case was registered against them and other unknown persons but the trial court, apart from them, convicted other three appellants, who had never been put on test identification parade, though in course of evidence, the witnesses P.Ws. 2 and 3 had identified in the court but such identification will have little value in absence of any test identification parade being conducted by the Investigating Officer, though it is said that when Investigating Officer apprehended four persons, the informant (P.W.2) who allegedly was along with raiding party, identified them but that identification will have no value as accused persons, who were suspected to have committed offence should have put on test identification parade which is being conducted after observing certain paraphernalias but the Investigating Officer never put them on test identification parade presumably for the reason that the informant had identified the accused persons at the time of their arrest and in that view of the matter, the trial court should not have convicted those persons, who were never named in the first information report nor were put on test identification parade.

10. Learned Counsel further submits that there has been no definite evidence as to who caused firearm injuries to the injured (P.W.3) in course of commission of alleged dacoity and in spite of that, the appellants Sumanta Tanti and Sushen Kaiberta have been convicted u/s 397 of the Indian Penal Code and Section 27 of the Arms Act apart from Section 395 of the Indian Penal Code which was quite illegal as had there been any evidence against those two appellants for causing injury in course of commission of dacoity, then they could have been convicted u/s 397 but not for both the offences, i.e, under Sections 397 and 395 of the Indian Penal Code and in that view of the matter, the impugned judgment suffers from illegality and is fit to be quashed.

11. Having heard learned Counsel appearing for the parties and on perusal of the record, I do find that while the informant Jhari Lal Soni (P.W.2) was returning

home from Sini Market along with his brother Ravindra Nath Soni (P.W.3) on a Motor Cycle, they were accosted in the way by five miscreants, of them two namely, Sumanta Tanti and Mano Sardar were identified by the informant Jhari Lal Soni (P.W.2) as well as by Ravindra Nath Soni (P.W.3) When they were asked to stop, they tried to flee from there by accelerating the speed of the Motor Cycle and then as per the fardbeyan, some of the miscreants fired shot which hit Ravindra Nath Soni (P.W.3), as a result of which, they fell down and then they again tried to flee from there and again someone fired shot causing another injury and then they took away the Motor Cycle.

12. It would be significant to note that neither Jhari Lal Soni (P.W.2) in his fardbeyan nor Ravindra Nath Soni (P.W.3) in his statement made u/s 161 of the Code of Criminal Procedure had stated that those two persons had fired shots. Further I do find that apart from Sumanta Tanti and Mano Sardar, none of the three appellants had been named in the fardbeyan. However, they have been identified in the court, though they had never been put on test identification parade but as per the case of the prosecution, they had been identified by the informant while they were arrested from the house of Mano Sardar. Therefore, the question for consideration would be as to whether in such situation, the trial court is justified in holding the appellants particularly those persons who were not named in the first information report guilty.

13. There has been no denying of the well settled principle that identification made by the witnesses during trial is primary and substantive evidence in the case. An identification parade belongs to the stage of investigation by the police. Like any other evidence procured during investigation, a test identification parade and result thereof can be utilized either for corroboration or for contradiction. Being some evidence procured during investigation, certainly it will not be a primary or substantive evidence during trial. There may be cases where identification of the assailants is more probable either because the occurrence takes place during day time or because there is otherwise sufficient light to detect the assailants or due to proximity of the victims with the assailants or due to prolongation of the entire occurrence. That apart, circumstances may be made out whereby it could be held that the assailants were easily identifiable. In those cases perhaps a test identification parade may not be necessary. However, there may be a case where circumstances are made out so that it may be impossible to hold that the features of the assailants could be noted by the witnesses and in such a case not only the identification made during trial will be disbelieved but even the supporting identification parade will also be disbelieved. In between there are numerous cases where circumstances exist so that it cannot be held with any amount of certainty as to whether the witness could or could not see the assailants. These circumstances may be due to paucity of light or time to identify a person. In such a case where nothing definite can be inferred, the mere identification by the witnesses made during trial may not be considered sufficient. The Court will require corroboration of that identification from a previously held test identification parade.

14. At this stage, I may refer to a decision rendered in a case of Vaikuntam Chandrappa and Others Vs. State of Andhra Pradesh, where it has been held hereunder:

It is also true that the substantive evidence is the 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 identify of the accused who are strangers to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding. There may be exception of this rule where the Court is satisfied that the evidence of a particular witness is such that it can safely rely on it, without the precaution of an earlier identification proceeding.

15. In the background of the said principle if the present case is considered, I do find that only two persons, namely, Sumanta Tanti and Mano Sardar were named in the first information report and their names were also disclosed by Jhari Lal Soni (P.W.2) immediately after the occurrence to P.W.1, when P.W.2 informed P.W.1 about the incident and according to P.Ws. 2 and 3, those two persons were known from before to whom they identified in the headlight of the Motor Cycle whereas other three appellants, namely, Sushen Kaiberta, Gandhi Modi and Laltu Sardar, according to evidences of both the witnesses, were never known and still both the witnesses claimed in course of evidence to have identified them, though occurrence took place in the night and according to the case of the prosecution itself, none of the witnesses had sufficient time to note the physical features of the other accused persons. In that view of the matter, it was quite obligatory on the part of the Investigating Officer to put those persons on test identification parade, but they were never put on test identification parade presumably for the reason that the informant did identify them while the police in course of raid had apprehended them but that procedure according to the aforesaid principle laid down by the Hon"ble Supreme Court appears to be quite foreign to the scheme of the Code of Criminal Procedure and under that situation, any claim that those three persons had participated in the alleged occurrence would hardly be believed. Thus, those three persons, namely, Sushen Kaiberta, Gandhi Modi and Laltu Sardar can certainly be said to have wrongly been convicted by the trial court.

16. However, taking into account the entire facts and circumstances as discussed above, there appears to be no reason for disbelieving the evidence of P.Ws. 1 and 2 so far it relates to the culpability of the appellants, Sumanto Tanti and Mano Sardar and hence, they have rightly been found to be guilty.

17. But the question would be as to whether the trial court was justified in convicting the appellant Sumanto Tanti u/s 397 of the Indian Penal Code and u/s 27 of the Arms Act? I have already noted that the informant in his fardbeyan has never said that Sumanto Tanti was having firearm with him nor he has been alleged to have fired shot. However, P.W.3 Rabindra Nath Soni has testified that first shot was fired by Sushen Kaiberta and the second shot was fired by

Sumanto Tanti but this piece of evidence does not find corroboration from the evidence of P.W.2 as he has said that out of two, namely Sumanto Tanti and Sushen Kaiberta, one of them fired shot. He has never disclosed as to who fired shot. Under this situation, it would not be safe to hold that Sumanto Tanti or Sushen Kaiberta had fired shot, as a result of which P.W.3 sustained injuries.

18. Under the circumstances, the trial court does not appear to be justified in holding Sumanto Tanti and Sushen Kaiberta guilty for an offence u/s 397 of the Indian Penal Code and Section 27 of the Arms Act and, hence, that part of the judgment of conviction and order of sentence is set aside.

19. In the result, the appellants, namely, Sushen Kaiberta, Ganbdhi Modi and Laltu Sardar are acquitted of all the charges levelled against them and are directed to be released forthwith, if not wanted in any other case whereas Sumanto Tanti and Mano Sardar have rightly been convicted for an offence u/s 395 of the Indian Penal Code which is hereby affirmed.

20. Coming to the point of sentence it appears from the judgment that both, who are quite young, do not have criminal antecedent and that they as has been found earlier did not cause injury to P.W.3 and that they faced rigor of trial since the year 2004 and thereby must have suffered mental agony and pain and hence sentence imposed against them is reduced to rigorous imprisonment for seven years which in the circumstances of the case would amply meet the ends of justice. So far sentence of fine is concerned that would remain intact.

21. In the result, both the appeals are allowed in part.