

(2003) 08 CAL CK 0038

In the Calcutta High Court

Case No : Criminal A. No"s. 144 and 196 of 1996

Raghunath Dey and etc.

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 20-08-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154
Penal Code, 1860 (IPC) — Section 396, 412

Citation : (2003) CriLJ 4592

Hon'ble Judges : Narayan Chandra Sil, J;Gorachand De, J

Bench : Division Bench

Advocate : Sudipto Moitra and Subhasish Pachal, in CRA No. 144/96 and Partha Sarathi Bhattacharjee, in CRA No. 194/96, for the Appellant;Kazi Safiullah, LPP, Hasi Saha and Subir Ganguly, for the Respondent

Judgement

Gorachand De, J.—These two appeals are directed against the judgment and order dated 10th April, 1996 passed by Shri A.K. Bose, Additional Sessions Judge, 2nd Court, Howrah in Sessions Trial Case No. XI (7) of 1992 arising out of G. R. Case No. 276 of 1990 and FIR No. 49 dated 9-2-90 of the Police Station-Bally, District -- Howrah. By the said judgment, the Id. Additional Sessions Judge found all the three accused persons, namely, Samir Bose, Santu Das and Raghunath Dey guilty u/s 396 of the Indian Penal Code, convicted them thereunder and sentenced each of them to suffer Rigorous Imprisonment for life. No separate sentence was passed for payment of fine. Accused Santu Das was also convicted u/s 412 of the Indian Penal Code and was sentenced to suffer Rigorous Imprisonment for five years and to pay a fine of Rs. 2000/-, in default, to suffer further Rigorous Imprisonment for six months with a direction that both the substantive sentences against him were to run concurrently.

2. The prosecution case in brief is that on the basis of the statement of one Saila Kumari Singh recorded by the police officer visiting her residence at 7/AB, Bamungachi, Railway Colony on 9-2-90 at 9.50 p.m., the FIR No. 49 dated 9-2-90 was recorded. It was stated before the police by the informant that on

9-2-90 at about 8.00 p.m. five persons entered inside their residence and one person stood in front of the gate as a guard, that those persons were carrying arms like Bhojali, pipe gun in their hands, that they pushed her inside the room where the other inmates of the family were present, that they showed them the Bhojali and pipe gun and threatened them to kill if they shouted, that the miscreants forcibly snatched away the keys from her mother and also snatched away the gold chain from her mother's neck, that they tried to open the almirah and they snatched away a silver chain from the neck of the wife of her elder brother, that her mother pushed one of them and opening the backdoor of the room started shouting, that hearing the shout, one of the dacoits fired from his pipe gun which struck the that of her nephew, Tinku Singh, that Tinku Singh sustained bleeding injury and fainted and was removed to a local doctor and then to the Howrah Hospital where he died.

3. The police investigated the case, arrested six persons including the three convicted persons and recovered two chains. The Test Identification Parade of the accused persons was also held and the statement of the accused Santu Das was recorded. Different witnesses were examined and after the close of the evidence, a charge-sheet was filed against all the six accused persons and cognizance was taken by the Id. SDJM on 2-12-91 and ultimately, the case was committed to the Court of Sessions on 21-7-92 with a direction upon the sureties to produce the absented accused persons before the Court of Sessions.

4. On 4-8-92, the case was transferred by the Id. Sessions Judge, Howrah to the 2nd Court of Additional Sessions Judge at Howrah for disposal. Accused Samir Bose was separately committed to the 2nd Court of Additional Sessions Judge after his arrest on the basis of separate order of committal and Sessions Trial Case No. VIII (7) of 1993 was started and both the Sessions Trials were tagged for final disposal. During the pendency of the Sessions Case before the said Court, the accused Suraj Gosai was reported to be murdered and accordingly, by Order No. 16 dated 27-3-95, the Id. Additional Sessions Judge passed an order that the case abated against him. Ultimately on 5-12-95, separate charges u/s 396 and u/s 412 of the Indian Penal Code were framed against the accused Samir Bose, Santu Das and Raghunath Dey who pleaded not guilty to the charge and accordingly, the prosecution was called upon to adduce the evidence. Between 29-1-96 and 26-2-96 the prosecution produced as many as 17 witnesses including the Investigating Officer and after examining the accused persons u/s 313 of the Cr. P.C., the case was fixed for hearing of argument as no defence evidence was adduced. After hearing the argument, the Id. Additional Sessions Judge found all the three accused persons guilty and convicted them in the manner indicated hereinabove.

5. It is already stated above that being aggrieved by the order of conviction and sentence, the Criminal Appeal No. 144/96 was filed by the convict, Raghunath Dey and Criminal Appeal No. 194/96 has been filed by the accused Santu Das alias Sentu Das The Id. counsels appearing on behalf of both the appellants made

a forceful argument praying for setting aside the judgment and order of conviction of the trial Court and prayed for acquittal of both the appellants. On the other hand, the Id. Public Prosecutor supported the judgment of the trial Court and argued at length for confirmation of the conviction and sentence of all the convicted persons.

6. Before entering into the evidence adduced in this case, we deem it proper to point out that the death of Tinku Singh, a boy of about 8 years of age as a result of gun-shot has been established on the basis of oral as well as documentary evidence including the post mortem report. It is also proved that the gun-shot injury was received by the said Tinku Singh in the night of 9-2-90 when there was a dacoit in the house of the de facto complainant at 7/AB, Bamungachi Railway Colony. It is also corroborated by the witnesses that a group of persons consisting of five or six heads entered into the said residence at about 8.00 p.m. on 9-2-90 with weapons in their hands and they snatched one gold chain of Sumitra Devi (PW 2) and a silver chain from the neck of Mayadevi Singh along with the ear-ring made of gold. So it is established that five or more persons conjointly committed a robbery in the residence of the de facto complainant on 9-2-90 and in course of such dacoit, a boy was murdered as a result of gun shot injury at the hands of one of such persons. So the element of commission of an offence u/s 396 of the Indian Penal Code has been well established in this case. Now the question is how far the prosecution has been able to connect the three convicted persons with the alleged offence.

7. Altogether 17 witnesses were examined by the prosecution in this case and 15 documents produced by the prosecution were marked as Exhibits. PW 1 Sailakumari Singh gave the statement before the police which was reduced to writing by the PW 16, Inspector Priyotosh Saraswati who was posted as Officer-in-Charge of the Bally Police Station on 9-2-90. The said statement (Ext. 1) was signed by the PW 1 and thereafter, it was sent to the Police Station for starting a case. Accordingly, the Bally P. S. Case No. 49 dated 9-2-90 was started and the case was endorsed to SI, Sachin Sarkar (PW 17) for investigation. It appears from the evidence of the PW 17 that after the initial investigation, he went on medical leave from 12-2-90 and resumed the charge of investigation from 24-10-90. It is also clarified that SI, K. Basu of the same Police Station conducted further investigation of the case during the period of absence of the PW 17 as per direction of the PW 16. The said SI, K. Basu, however, has not been examined in this case and it appears that the trial Court duly considered this aspect as well as analysed the consequences thereof. In fact, non-examination of SI, K. Basu was not fatal to the prosecution and as such, his non-examination was not challenged by the Id. counsel for the appellants before this Court.

8. So the fact remains that the P.W. 1 narrated the incident before the police and it appears from Ext. 1 that she gave a detailed description of the persons who entered in her house on 9-2-90. She also narrated how the miscreants snatched

away the gold chain from the neck of her mother Sumitra Devi (PW 2) and the silver chain and ear-ring from her brother's wife Mayadevi Singh (PW 4) and ultimately one of them fired on Tinku as a result of which the boy sustained bleeding injury and subsequently died. The statements made by the PW 1 in the FIR were fully corroborated by her while examined as PW 1. She also identified the accused Samir, Raghunath, Jhantu in course of TI Parade inside the jail on 3-5-90. She also identified the accused Santu in the TI Parade held on 8-6-90 inside the jail. It also appears that the PW 1 duly identified the accused Samir, Raghunath, and Santu inside the Court while examined as P.W. 1. So, it is sufficiently clear that the PW 1 gave description of the convicts in the FIR (Ext. 1) and thereafter identified them in the TI Parade as well as in Court. Excepting the discrepancies as regards the part played by the miscreants individually, her evidence was corroborated in cross-examination as regards identification of the miscreants including the present two convicted persons Raghunath and Santu.

9. The PW 2 also narrated the incident including the snatching of her neck chain as well as the neck chain of the PW 4. She also identified accused Samir, Jhantu and Santu in TI Parade. The PW 2 also identified accused Santu in Court while examined as PW 2. Of course the PW 2 did not identify the convict Raghunath. But the fact remains that she duly identified the convict Santu.

10. The PW 4, mother of the deceased Tinku, corroborated the PW 1 and PW 2 as regards the commission of dacoity and snatching of the neck chain and ear-ring. She also identified the accused Samir in the TI Parade as well as in Court, but the PW 4 did not identify the present appellant Raghunath or Santu.

11. The PW 5, Indradeo Singh uncle-in-law of the PW 2, also narrated the incident of dacoity and identified the accused Samir and Jhantu. He also identified the accused Samir in Court. But he did not identify the present appellants Raghunath or Santu either in the TI Parade or before the Court.

12. However, the PW 8, Shewkumari Singh another inmate of that house also narrated the incident of dacoity. She identified the accused Raghunath in the TI Parade as well as in Court while examined as PW 8. However, she did not identify the accused Santu.

13. Besides these witnesses, PW 9 --Bhagabanji Singh -- a relation of the PW 1 and PW 10, Birendra Singh, father of the deceased Tinku deposed in this case. But they practically did not give any evidence as they were not present at the time of commission of dacoity. Both of them claimed that they heard the incident from the inmates of the house. So out of seven witnesses the vital witnesses are PW 1, PW 2, PW 4, PW 5 and PW 8 and from their evidence, it is sufficiently established that there was dacoity in the house, that one gold neck chain of PW 2 and one silver neck chain and earring of PW 4 were snatched and the boy Tinku died as a result of the gun-shot injury at the hand of one of the miscreants entered inside the house. It is also clear from the evidence of these vital witnesses that the miscreants entered inside the house, armed with weapons like

Bhojali, dagger and fire arms. The PW 11 is a neighbour and he also came to the spot after the occurrence and became a seizure list witness in respect of the blood seized from the spot by the police. So the evidence on record are sufficient to indicate that more than five persons committed the dacoity in the night of 9-2-90 in the house of the de facto-complainant and in course of such dacoity, the boy Tinku received gun-shot injury from the fire arm of one of the miscreants and subsequently died.

14. The PW 12 is the shop-keeper from whose shop the snatched gold chain was recovered. The Seizure List (Ext. 7) indicates that the said gold chain was shown in the stock accounts of the shop-keeper and it was placed before him by one Raju Shaw on 11-2-90 for the purpose of making a pair of ear-rings. In the seizure list it is indicated that the accused Santu Das identified the said shop of the goldsmith. But it is to be noted that there is nothing on record to show or indicate that the accused Santu Das made a statement before the police as regards the gold chain and thereafter led the police party to the shop of the goldsmith for recovery. In fact, there is nothing on record to show or indicate that the provision of Section 27 of the Evidence Act was complied with. It is also not proved by any of the witnesses that the accused Santu Das was present when the seizure of the gold chain from the shop of PW 12 was recovered. The signature of Santu was also not appearing in the Seizure List prepared on 17-4-90. It is interesting to note that the seizure of the gold chain was done on 17-4-90 between 6-30 and 7-00 p.m., but the record indicates that Santu with Samir and Raghunath was arrested and produced before the Court on 18-4-90. So, it is not clarified as to whether the gold chain was recovered after the arrest of the accused Santu or before that. Be that as it may, the recovery of the gold chain at the instance of the accused Santu has not been established and as such, it is rightly argued by the Id. counsel for the appellant Santu that the conviction of Santu u/s 412 of the IPC cannot be sustained in law. It appears from the judgment of the trial Court that the Id. Sessions Judge did not examine this aspect in its proper perspective and practically failure of justice has occasioned on this score. So we hold and conclude that the prosecution has not been able to prove the charge u/s 412 of the IPC against the accused Santu and as such, he is liable to be found not guilty under that section and is to be acquitted after setting aside the sentence imposed on this count.

15. The fact remains that the gold chain was recovered and it was duly identified by the witnesses. Similarly the PW 13 proved the seizure of the silver chain as brought out by the accused Raju Shaw. The seizure list (Ext. 8) also bears the L/ TI of the accused Raju Shaw and it has been duly proved. The said silver chain was duly identified by the PW 4 as her own.

16. So the recovery of the gold chain and the silver chain and their identification by the witnesses are sufficient to indicate that the police duly recovered the stolen articles at the instance of the miscreants.

17. The PW 14 is the ASI of Police who did inquest on the dead body of Tinku,

and the PW 3 is the constable who carried the dead body for post mortem examination and identified it before the Autopsy Surgeon (PW 7). It is opened by the Autopsy Surgeon that Tinku died as a result of the gun shot.

18. The PW 15 another SI of Police practically did not state anything touching this case.

19. The PW 17 is the Investigating Officer, who investigated the case initially and subsequently, he submitted the charge-sheet in this case. The statement of the vital witnesses were recorded by the PW 17 and practically, discrepancy, if any, in the statement made before the police and the evidence adduced before the Court and as pointed out by the defence were duly taken into consideration by the trial Court which came to a right conclusion that there was no gap in the chain as regards the evidence collected in this case and proved before the Court.

20. The PW 6 is the Judicial Magistrate who conducted the TI Parade of the accused persons. His evidence is that on 3-5-90, five accused persons namely, Samir, Raghunath, Raju, Suraj and Jhantu were placed for TI Parade inside the Jail and the TI Parade was conducted in accordance with the law. Similarly he has also proved that on 8-6-1990 the TI Parade of Santu was conducted inside the Jail in the usual manner. Of course, the accused Samir and Suraj (since murdered) stated before the Id. Magistrate that they were identified to the witnesses earlier. Similarly accused Santu Das also complained that his photograph was taken at the Police Station before the TI Parade. But all the witnesses who identified the suspects in the TI Parade practically denied the defence suggesting that they had any occasion to know the identity of the miscreants from before. It appears that the trial Court duly discussed this aspect in details and came to a just decision that there was no irregularity in the TI Parade.

21. The Id. counsel for the appellants tried to argue that the PW: 1 failed to identify the person who actually fired on Tinku, and as such, she made contradictory statement as can be found from the TI Parade sheet as well as the evidence adduced before the Court. We have minutely examined this aspect and it appears that the trial Court also analysed the evidence in details and came to a just conclusion that the TI Parade was rightly done in accordance with the law. It is rightly commented that if there was any collusion, all the witnesses could have easily identified the suspects either in the TI Parade or before the Court. It is analysed hereinabove that in the TI Parade the PW 1 identified the accused Samir, Raghunath, Suraj, Jhantu and Santu Whereas the PW 2 identified Samir, Jhantu and Santu. On the other hand, the PW 4 identified Samir. PW 5 identified Samir and Jhantu and PW 8 identified Raghunath. So it is rightly concluded that that the story of collusion as alleged by the defence in holding the TI Parade is to be ruled out. It is also to be noted that there was a gap of about five years from the date of the TI Parade till the examination of the witnesses in Court and as such, this time gap was sufficient for the witnesses to forget the actual part played by the miscreants while committing the alleged offence. So the

discrepancies as pointed out by the Id. counsels for the appellants are not so much vital specially when the witnesses duly identified the miscreants in the TI Parade as well as in course of the trial.

22. The Id. counsel for the appellants, however, tried to argue that the G.D. Entry No. 544 dated 9-2-90 (Ext. 11) is to be treated as FIR in this case and as such, the statement of the PW 1 as recorded by the PW 16 being a statement recorded and signed cannot be used in this case being barred under the provisions of Section 162 of the Cr. P.C. It is to be noted that in the said G. D. Entry, it is simply indicated that an information was received over the RT that a dacoity was committed in the house of Shri Bhagabanji Singh and the dacoits fired one round from pipe gun causing injury to a boy aged about six years. So the information received over the RT were reproduced in the GD Entry No. 544. It was only the information about an incident without verification as to who reported the matter to the police. Practically it was a message indicating that a probe is to be made as regards an information given over the RT. That information was not in the nature of a complaint nor there were sufficient materials to take up the investigation of the case on its basis. It is clarified by the Apex Court in *The State of Bombay Vs. Rusy Mistry and Another*, that the first information given by an informant is that information on which the investigation is commenced. In *Nemai Adak and Others Vs. The State*, it is clarified that a cryptic message meant to be an appeal for immediate relief is not to be treated as FIR. The information passed over the RT was merely a confidential information received by the police which was required to be ascertained for the purpose of starting, a case and as such, the said information cannot be treated as an information for starting a case u/s 154 of the Cr. P.C. So after a due consideration of the facts and circumstances, and keeping in mind that the police after examining the de facto complainant and taking her signature on the written complaint started the case treating the said written complaint as the FIR u/s 154, we are of the view that it is not affected by the bar imposed u/s 162 of the Cr. P.C.

23. Much was argued on behalf of the appellants on the confessional statement of the accused Santu recorded by the Magistrate. It is to be noted that the trial Court did not place any reliance on the said confessional statement inasmuch as the PW 6 who actually recorded the statement was not confronted with the said statement. The defence did not get any opportunity to cross-examine the PW 6 on it. Moreover the Id. counsel for the appellants rightly argued placing reliance on the decisions reported in *Devendra Prasad Tiwari Vs. State of U.P.*, 1991 Cal Cri LR 121 (*State v. Prosenjit Tapadar*) and *Shivappa Vs. State of Karnataka*, that the confessional statement of the accused Santu cannot be treated as a voluntary statement. It is nowhere indicated in the report that the Magistrate told the accused that he would not be remanded to the police lock-up even if he did not confess his guilt. It is also not indicated in the report of the Magistrate that the accused was actually kept in Jail Custody in segregation in terms of the order passed and that before production of the accused before the Magistrate, he was not given in the clutches of the police. So it appears that there was non-

compliance with the provisions of Section 164 as well as the Rules and Guidelines framed in this regard and accordingly, the said confession was unworthy of credence. The Id. Sessions Judge rightly discussed this issue and did not place any reliance on such statement. It was also argued on behalf of the appellants that the alleged fire on Tinku is not to be construed as the intentional murder inasmuch as there was no evidence that to stop that victim, any of the miscreants fired on him. An attempt was made to argue that it was merely an accidental firing without any intention to commit a murder and as such, all the accused persons including the appellants should not be found guilty u/s 396 of the Code.

24. But the Id. Public Prosecutor rightly argued that in Section 396 of the IPC, there is no differentiation of culpable homicide amounting to murder and not amounting to murder. The language of Section 396 is very clear on this point. The requirements of Section 396 are --

- (i) The dacoity must be the joint act of the persons concerned,
- (ii) Murder must have been committed in the course of the commission of the dacoity.

25. So it is concluded that when murder was committed in course of the commission of the dacoity, it is not possible to construe the alleged offence either u/s 395 or u/s 397 of the IPC. On the other hand, the Id. Public Prosecutor rightly placed reliance on the decisions of the Apex Court in Kalika Tiwari and others Vs. State of Bihar, and State of U.P. Vs. Bhoora and Others, in support of the contention that all the participants in a particular crime of dacoity with murder are to be construed equally u/s 396 of the IPC. So after a due consideration of the law on the point and keeping in view the facts and circumstances of this case, we come to a conclusion that the convicts were rightly found guilty u/s 396 of the IPC and they were rightly convicted thereunder.

26. As regards punishment the Id. counsel of both the appellants prayed for due consideration of the facts and circumstances of this case specially the fact that no previous conviction against any of the convicted persons has been found. Hence the Id. counsel made a forceful argument for reduction of the life sentence imposed in this case. The Id. Public Prosecutor on this score, on the other hand, placing reliance on the provisions of Section 465 of the Code of Criminal Procedure contended that the sentence passed by a Court of competent jurisdiction shall not be altered by a Court of appeal unless in the opinion of that Court it is found that a failure of justice has, in fact, been occasioned. It appears that though the trial Court after giving a verdict of conviction of the accused persons on 9-4-96 fixed 10-4-96 for hearing the submissions of the convicted persons, but it is nowhere indicated that the date was fixed u/s 235(2) of the Cr. P.C. for hearing the accused persons on the question of sentence. On 10-4-96 when the accused persons were produced before the trial Court, both of them prayed for mercy on the ground that they were young in age and they had

families to maintain. Practically the accused persons were not given proper guidance in this regard. The provision of Section 235(2) is fundamental in nature and it is not to be construed as a routine matter. It is a settled principle of law that the right of the accused to be heard on the point of sentence cannot be denied and practically, passing of sentence after conviction without giving sufficient opportunity to the accused to make his submission on the point of sentence has been deprecated by the Apex Court, and in appropriate case when it has been noticed that hearing of the accused on the point of sentence was not done before passing of the sentence, the sentence was set aside and the case was remanded to the trial Court only for the limited purpose of hearing the accused before sentencing as required under the law. In the present case it appears that no proper opportunity was given to the accused persons to be heard on the point of sentence. But for this purpose, remand of the case to the trial Court is not necessary after a lapse of seven years from the date of conviction.

27. It appears that the accused persons were aged about 30 years at the time of trial as can be ascertained from their statement recorded u/s 313 of the Cr. P.C. It was not clarified to the accused persons that u/s 396 of the IPC each of the accused persons were liable to be punished with death or imprisonment for life or Rigorous Imprisonment for a term which may extend to 10 years, and shall also be liable to fine. So the accused persons did not get any opportunity to give their reply on the point of sentence. It appears from the record that the accused persons were arrested in the year 1990 and were convicted after facing a trial for about 6 years. So at the time of commission of the crime they were aged about 23-24 years. There is no allegation of their prior involvement with any group of criminals or participation in any criminal activity. They are already in custody for more than 7 years. So judging from this stand point, specially the fact that the trial Court did not hear the accused persons properly on the point of sentence, we are of the view that a failure of justice, in fact, has occasioned on the point of passing the sentence and as such, keeping the finding in tact the sentence imposed should be altered. Keeping in view the nature of the case specially the argument as advanced by the appellants that it was an unintentional murder of a child in course of the alleged dacoity, we are of the view that a sentence of Rigorous Imprisonment for ten years with fine of Rs. 5,000/- will meet the ends of justice. So after due consideration we deem it proper to alter the sentence after affirming the conviction of the appellants u/s 396 of the IPC. Of course it is already discussed above that the conviction of the accused Santu u/s 412 of the IPC is to be set aside after finding him not guilty to the charge.

28. Both the appeals are accordingly allowed in part. The conviction of both the appellants in these two appeals u/s 396 of the IPC are hereby affirmed. However the sentence imposed upon both the appellants are hereby modified and reduced. Each of the appellants namely Raghunath De and Santu alias Sentu Das are to suffer Rigorous Imprisonment for ten years and also to pay a fine of Rs. 5000/-, in default, to suffer further Rigorous Imprisonment for six months. The

conviction and sentence of the appellant Santu Das u/s 412 of the IPC are hereby set aside and he is acquitted from this charge. The period of detention suffered by both the appellants is to be set off against the sentence of imprisonment u/s 428 of the Code of Criminal Procedure. This judgment do govern the fate of both the appeals. Let this order along with the lower Court record be sent down with promptitude.