IN THE HIGH COURT OF ORISSA, CUTTACK

CRLA No. 21 of 2012

From the judgment and order dated 30.11.2011 passed by the Adhoc Addl. Sessions Judge (F.T.C), Bhubaneswar in Crl. Tr. Case No.47/205/2010.

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1. Baikuntha Bhoi
2. Prasanta Nayak ..... Appellants

-Versus-

State of Odisha ..... Respondent

For Appellant: - Mr. Rashmi Ranjan Nayak
Amicus Curiae

For Respondent: - Mr. Priyabrata Tripathy
Addl. Standing Counsel

CRLA No. 504 of 2012

Bishnu Nayak ..... Appellant

-Versus-

State of Odisha ..... Respondent

For Appellant: - Mr. Rashmi Ranjan Nayak
Advocate

For Respondent: - Mr. Priyabrata Tripathy
Addl. Standing Counsel

CRLA No. 719 of 2012

Raju @ Rajesh Behera ..... Appellant

-Versus-

State of Odisha ..... Respondent

For Appellant:	-	Mr. Rashmi Ranjan Nayak Amicus Curiae
For Respondent:	-	Mr. Priyabrata Tripathy Addl. Standing Counsel

P R E S E N T:

THE HON'BLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 04.04.2024

S. K. SAHOO, J. The appellants Baikuntha Bhoi and Prasanta Nayak in CRLA No. 21 of 2012, the appellant Bishnu Nayak in CRLA No.504 of 2012 and the appellant Raju @ Rajesh Behera in CRLA No. 719 of 2012 faced trial in the Court of learned Adhoc Addl. Sessions Judge (FTC), Bhubaneswar in Crl. Tr. Case No.47/205/2010 for commission of offence under section 395 of the Indian Penal Code (in short, 'I.P.C.') on the accusation that on 13th June, 2010 at about 10.30 p.m. at Palasuni under Mancheswar police station, Bhubaneswar, they committed dacoity in respect of cash amounting to Rs.8,000/-, two numbers of mobiles, one suitcase, etc. of the informant, Bhabani Shankar Nayak (P.W.4).

The learned trial Court vide impugned judgment and order dated 30.11.2011 convicted all the appellants under section 395 of the Indian Penal Code and sentenced each of

them to undergo R.I. for five years each and to pay a fine of Rs.3,000/- (rupees three thousand) each, in default, to undergo further R.I. for three months each.

Prosecution Case:

2. The prosecution case, in short, is that on 13.06.2010 at about 10.30 p.m., Bhabani Shankar Nayak (P.W.4), the informant in the case, returned from Bangalore to Bhubaneswar by Prasanti Express and near Master Canteen Chhak, he was waiting for an auto rickshaw to proceed to Palasuni to his house. In the meantime, one Omni Maruti car came near him and the driver called him and agreed to leave him at Palasuni. He boarded the Omni car and three other persons were also present in that car. One passerby, who boarded in the said vehicle, got down at Vani Vihar. When P.W.4 asked him to stop the vehicle, he did not listen to him and drove the car speedily. It is the further prosecution case that all the appellants assaulted P.W.4 inside the car causing bleeding injuries on his person. They also forcibly took away his cash of Rs.8,000/-, two valuable mobiles, a trolley suit case and other valuable articles and threw him out by the side of the road at Trinath Bazar. Thereafter, a young man came and rescued him and then the police officers with P.C.R. van came and also rescued him.

On the basis of the written report presented by P.W.4, the Inspector in-charge of Mancheswar police station registered Mancheswar P.S. Case No. 142 dated 14.06.2010 against four unknown persons and directed Abhinaba Dalua, S.I. of Police (P.W.8) to take up investigation of the case.

During the course of investigation, P.W.8 examined the informant (P.W.4), visited the spot, sent the injured informant to Capital Hospital, Bhubaneswar for medical examination and examined other witnesses. Subsequently, on 22.06.2010 on getting information from S.I. Sitakanta Das of Sahid Nagar police station, he proceeded to Sahid Nagar police station and examined the appellant Raju @ Rajesh Behera, who confessed his guilt and disclosed the names of other appellants before him and P.W.9. He recorded the confessional statement of the appellant Raju @ Rajesh Behera and being led by the said appellant on 22.06.2010 at 11.00 a.m., some articles were recovered and accordingly, P.W.8 seized the same as per seizure list Ext.5. The appellant Bishnu Nayak was taken on remand along with appellant Raju @ Rajesh Behera and P.W.8 made a prayer before the Court for conducting T.I. parade of the appellants Raju @ Rajesh Behera and Bishnu Nayak and accordingly, T.I. parade was conducted at Bhubaneswar Special Jail, Jharpada on 26.06.2010 in which P.W.4, the informant

participated as identifying witness and he correctly identified both the appellants. P.W.8 also seized the Maruti van as per seizure list Ext.6 on 01.07.2010 from the owner of Maruti van, namely, Sushanta Kumar Samal (P.W.1) and on 08.08.2010 he left the car in the zima of P.W.1 after verifying its documents as per zimanama Ext.7. On 24.10.2010, P.W.8 also submitted remand report against the other appellants since they were forwarded to Court in Sahid Nagar P.S. Case No. 176 of 2010. On completion of investigation, P.W.8 submitted charge sheet on 18.10.2010 against the appellants under section 395 of the I.P.C. showing one Janu Bhoi as absconder.

Prosecution Witnesses, Exhibits & Material Objects:

3. In order to substantiate its case, the prosecution has examined as many as nine witnesses.

P.W.1 Susanta Kumar Samal, who is the owner of the offending vehicle (Omni Maruti Van) bearing registration No.OR-02Z-3292, has stated that appellant Raju @ Rajesh Behera was working as driver of the said vehicle.

P.W.2 Kanhu Charan Bhanja has stated that the father of the informant was staying in his colony and he informed him that the informant sustained injuries on his body while returning from Bangalore.

P.W.3 Madan Mohan Sahu has been declared hostile.

P.W.4 Bhabani Sankar Nayak is the informant in the case and he supported the prosecution case. He identified two appellants in the T.I. parade.

P.W.5 Hemanta Sarangi has stated that on hearing the incident from P.W.4, he had been to his house and found bleeding injuries on P.W.4 on his face, shoulder and scapular region and he came to know about the incident from P.W.4.

P.W.6 Chitta Ranjan Nayak is the father of the informant (P.W.4) and a post occurrence witness.

P.W.7 Dr. Prabhat Kumar Sahoo, who was working as Medical Officer in Capital Hospital, Bhubaneswar examined the injured informant (P.W.4) and proved his report vide Ext.2.

P.W.8 Abhinaba Dalua, who was working as Sub-Inspector of Police in Mancheswar Police Station, is the Investigating Officer of the case.

P.W.9 Pradeep Barisal is a witness to the confession made by the appellant Raju @ Rajesh Behera before him as well as the police regarding the incident. He is also a witness to the seizure of one black purse containing cash of Rs.600/-, one certificate and one card as per seizure list Ext.5.

The prosecution exhibited seven documents. Ext.1 is the F.I.R., Ext.2 is the T.I. parade report, Ext.3 is the inquest report, Ext.4 is the confessional statement of appellant Raju @ Rajesh Behera, Exts.5 and 6 are the seizure lists and Ext.7 is the zimanama.

The prosecution also proved four material objects. M.O.I is the money purse, M.O.II is the photograph,M.O.III is the xerox copy of the matriculation certificate and M.O.IV is the six nos. of one hundred rupee notes.

Defence Plea:

4. The defence plea of the appellants is one of complete denial to the prosecution case and they pleaded innocence. However, the appellant Prasanta Nayak pleaded that while his brother was in the police custody, he visited to his brother and the police arrested him. No witness was examined on behalf of the defence.

Findings of the Trial Court:

5. The learned trial Court after assessing the oral as well as documentary evidence on record came to hold that the evidence of the informant (P.W.4) does not suffer from any infirmity as it was corroborated by the evidence of P.Ws.6, 8 and 9 and there is evidence that the individual act of the appellants was a manifestation of the common intention of others, who

participated in the crime. It is further held that P.W.4 has identified the appellant Raju @ Rajesh Behera and Bishnu Bhoi in the T.I. parade, which was conducted properly and besides that there was recovery of the articles seized under seizure list (Ext.5) belonging to P.W.4 in presence of P.Ws.8 and 9 being led by the appellant Raju @ Rajesh Behera, which further strengthens the prosecution case. It is also held that there is nothing to disbelieve the prosecution case when the evidence on record is clear, unambiguous and cogent from all angles and all the accused persons were acting conjointly and committed dacoity inside the Omni Maruti van and looted all the belongings of P.W.4. Further, the learned trial Court has held that the substantive evidence of the informant i.e. the victim of dacoity and the witnesses implicated the appellants in the commission of dacoity and their evidence is corroborated by recovery of the stolen articles from the possession of appellant Raju @ Rajesh Behera, who was duly identified by P.W.4 and proved by the prosecution and accordingly, the appellants were held guilty of the offence charged.

Contentions of Parties:

6. When the matters were called out, none appeared on behalf of the appellants in CRLA No.21 of 2012 so also for the appellant in CRLA No. 719 of 2012. Thus, Mr. Rashmi Ranjan Nayak, learned counsel for the appellant Bishnu Nayak in CRLA

No. 504 of 2012, who gave consent to assist this Court for disposal of the other two appeals, is engaged as Amicus Curiae in CRLA No.21 of 2012 so also in CRLA No.719 of 2012.

Mr. Rashmi Ranjan Nayak, learned counsel for the appellants argued that since as per the F.I.R., four unknown persons committed the crime and the four persons, i.e. appellants Raju @ Rajesh Behera, Baikuntha Bhoi, Prasanta Nayak and Bishnu Nayak faced trial and there is no mention in the charge that they along with others committed the crime and from the evidence of the informant (P.W.4), it also appears that four persons participated in the crime, therefore, the framing of charge for the offence under section 395 of the Indian Penal Code so also the conviction of the appellants under the said offence is not sustainable in the eyes of law. Learned counsel further argued that the informant being examined as P.W.4 has stated in the examination-in-chief that he knew the appellant Bishnu Charan Nayak and Rajesh Behera and throughout his deposition, he has also stated what overt act has been committed by those two appellants but all the same, the names of these two appellants are not there in the F.I.R. lodged by P.W.4, which creates a doubt about any acquaintance of P.W.4 with these two appellants. Learned counsel further submitted that in the cross-examination, P.W.4 has stated that he did not know the appellant Raju @ Rajesh Behera prior to the occurrence

and the police conducted test identification parade in which he identified the appellant Raju @ Rajesh Behera. Learned counsel further submitted that the T.I. parade report indicates that only two appellants, namely, Raju @ Rajesh Behera and Bishnu Nayak were placed in the T.I. parade and they were identified by P.W.4. There is no material against the other two appellants, i.e. Baikuntha Bhoi and Prasanta Nayak except the confessional statement of the appellant Raju @ Rajesh Behera, which was stated to have been recorded by the I.O. (P.W.8) on 22.06.2010 as per Ext.4. Learned counsel further argued that even though the I.O. has stated that at the instance of the appellant Raju @ Rajesh Behera, one black colour money purse, a coloured pass port size photograph of P.W.4 so also xerox copy of matriculation certificate of P.W.4 and one original pan allotment letter of P.W.4 and six nos. of hundred rupees notes were recovered as per seizure list Ext.5, but neither the money purse was placed in the T.I. parade nor it was identified by the informant (P.W.4) in Court during trial. The money purse, the photograph, xerox copy of the matriculation certificate and six hundred rupees notes were marked as M.Os. by the I.O. (P.W.8). Learned counsel further argued that the Magistrate who conducted the T.I. parade has also not been examined and in such a scenario, benefit of doubt should be extended to all the appellants.

Mr. Priyabrata Tripathy, learned counsel appearing for the State, on the other hand, while supporting the impugned judgment and the order of conviction, submitted that it appears from the case records, for the appellants Baikuntha Bhoi and Prasanta Nayak, no T.I. parade has been conducted and these two appellants were also not identified by the informant (P.W.4) during trial. However, he submitted that since the appellant Raju @ Rajesh Behera and Bishnu Nayak have not only been identified in the T.I. parade by P.W.4 but also they were identified in Court during trial and there was recovery of money purse, photograph, xerox copy of the matriculation certificate and original PAN allotment letter of the informant (P.W.4) and six nos. of hundred rupees notes at the instance of the appellant Raju @ Rajesh Behera, the learned trial Court is quite justified in holding the appellants guilty of the offence charged.

Whether the appellants are guilty of committing dacoity?:

7. Adverting to the contentions raised by the learned counsel for the respective parties and coming to the charge framed in this case, it reads as follows:-

> "I, …….. Adhoc Addl. Sessions Judge (F.T.C.), Bhubaneswar, do hereby charge you:
>
> 1. Raju © Rajesh Behera
> 2. Baikuntha Bhoi,
> 3. Bishnu Nayak &

4. Prasanta Nayak,

as follows :

> That, you on or about the 13th day of June, 2010 at about 10.30 P.M, at palasuni under Mancheswar P.S., committed dacoity, in respect of cash of Rs.8,000/-, two numbers of mobiles, one suitcase, etc. of the informant, Bhabani Shankar Nayak, an offence punishable under section 395 of the I.P.C. and within my cognizance.
>
> And I hereby direct that you be tried by this Court on the said charge.
>
> The contents of the charge are read over and explained to the accused persons, who plead not guilty and claim trial.
>
> Dated, this the 14th day of December, 2010."

Needless to say that F.I.R. was lodged against four unknown persons and the informant, being examined as P.W.4, has also stated about participation of four persons in the crime. In absence of any material on record that five or more persons have participated in the crime, the ingredients of the offence of dacoity as enumerated in section 391 of the I.P.C. are not satisfied. Section 391 of the I.P.C. reads as follows:

> "When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so

committing, attempting or aiding, is said to commit "dacoity".

Robbery is an aggravated form of theft or extortion and similarly, dacoity is an aggravated form of robbery when persons taking part therein are five or more.

In the case of **Ram Lakhan -Vrs.- State of U.P. reported in A.I.R. 1983 Supreme Court 352**, where the appellant was tried along with eight others and whilst the others were acquitted and only the appellant Ram Lakhan was convicted under section 395 of I.P.C., it was held that the conviction of the appellant under section 395 of I.P.C. is not sustainable as before an offence under section 395 of I.P.C. can be made out, there must be an assembly of five or more persons. In the case of **Ram Shankar Singh and others -Vrs.- State of U.P. reported in A.I.R. 1956 Supreme Court 441**, it was held that charge framed against six persons placed on trial did not indicate that those six persons along with other unknown persons had committed dacoity and the charge was that the six persons placed on trial were the persons who had committed dacoity and when the High Court acquitted three out of six persons jointly tried, then three appellants were only left out as the persons concerned with the crime and therefore, the three appellants could not be convicted under section 395 of I.P.C. on the charge

framed, however they could be convicted for the lesser offence of robbery under section 392 of I.P.C.

Thus, since one of the essential ingredients of the offence under section 395 of the I.P.C. is that five or more persons must have conjointly committed or attempted to commit robbery, the framing of charge against the four appellants under section 395 of the I.P.C. by the learned trial Court, without any indication that they four along with others committed dacoity, the framing of charge so also the conviction of the appellants under section 395 of the I.P.C. is not sustainable in the eyes of law, particularly when there is no evidence on record adduced during trial that five or more persons conjointly committed or attempted to commit robbery.

Whether the evidence of identification of the appellants is acceptable?:

8. P.W.4, the informant has not named any of the accused persons in the F.I.R. (Ext.1) and that is how it was lodged against four unknown persons. In the examination-in-chief, P.W.4 has stated that he knew the appellants Bishnu Charan Nayak and Raju @ Rajesh Behera. He further stated that while he was waiting near Master Canteen, a Maruti Omni vehicle being driven by appellant Raju @ Rajesh Behera arrived there. He further stated that the appellant Raju @ Rajesh Behera

assaulted on his head, squeezed his neck and asked him to deliver his belongings. He further stated that the appellant Bishnu Nayak was all along assaulting him. Thus, from the examination-in-chief, it appears as if P.W.4 knew the two appellants, namely, Bishnu Nayak and Raju @ Rajesh Behera beforehand. If that be so, it was expected of him to mention their names in the F.I.R., but since the names of these two appellants do not find place in the F.I.R., their involvement in the crime becomes a doubtful feature. In the case of **Tukuna Rauta -Vrs.- State of Odisha reported in (2021) 84 Orissa Criminal Reports 55**, this Court has held that despite knowing the name of the accused, omission on the part of the informant to mention the same in the F.I.R. affects the probabilities of the case and such omission is relevant under section 11 of the Evidence Act in judging veracity of the prosecution case and also gives rise to the reasonable doubt that the appellant was not a participant in the crime.

In the cross-examination, P.W.4 has stated that he did not know appellant Raju @ Rajesh Behera prior to the occurrence and the police conducted T.I. parade wherein he identified appellant Raju @ Rajesh Behera. It is the prosecution case that only one T.I. parade has been conducted in Jharpada Jail, Bhubaneswar on 26.06.2010 in connection with this case by

the Magistrate, who has not been examined. However, the T.I. parade report (Ext.2) has been proved by none else than the informant (P.W.4). If P.W.4 got the scope to identify the appellant Raju @ Rajesh Behera in the T.I. parade conducted by the police, then the sanctity of T.I. parade which was conducted at a later point of time by the Magistrate is lost. The Hon'ble Supreme Court has made it clear that the requirement to hold an identification parade can only arise when the accused are not previously known to the informant/witnesses. In the case of **Amitsingh Bhikamsingh Thakur -Vrs.- State of Maharashtra reported in (2007) 2 Supreme Court Cases 310**, the above position of law has been clarified as follows:

> "13…The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eye witnesses of the crime."

The Hon'ble Supreme Court has time and again held that test identification parade of accused persons known to the informant/witnesses is of no value and meaningless. In the case of **Dhananjay Shanker Shetty -Vrs.- State of Maharashtra reported in (2002) 6 Supreme Court Cases 596**, the Hon'ble Court held as follows:

> "8. Next circumstance against the appellant was his so-called identification in the test identification parade by P.W.s 1, 3 and 9. The trial court as well as the High Court has found various legal infirmities in the holding of test identification parade, as such no reliance has been placed thereon. Moreover, as the appellant was named accused person, his so-called identification in the test identification parade could not be of any avail to the prosecution as it was meaningless."
>
> [Emphasis added]

Above all, the prosecution has not offered any explanation as to why the Magistrate, who conducted T.I. parade was not examined to prove the report, inasmuch as many things the defence could have brought out by way of cross-examination of the Magistrate regarding the irregularities or procedural infirmities, if any, made during conduct of the T.I. parade. Recently, in the case of **Umesh Chandra and others -Vrs.-**

State of Uttarakhand reported in (2021) 17 Supreme Court Cases 616, the Hon'ble Supreme Court has expressed concern about non-examination of Magistrates to prove the sanctity of T.I. parade and observed as follows:

> "10. But more important than that, the test identification parade being a part of the investigation, has to be proved by the prosecution as having been held in accordance with law. The onus lies on the prosecution to establish that the T.I parade was held in accordance with law. It is only after the prosecution prima facie establishes a valid T.I parade having been held, the question of considering any objection to the same arises. If the prosecution has failed to establish that a T.I parade was properly held by examining the witnesses to the same, there is nothing for the accused to disprove. In the present case, a Magistrate is stated to have conducted the T.I parade. The Magistrate has not been examined. No explanation is forthcoming why the Magistrate was not examined."

Thus, it is undisputed that the Public Prosecutor has a duty to examine the Magistrate who conducts the T.I. parade so that the legal sanctity of the T.I. parade report can be ascertained during the trial. Non-examination of the Magistrate strikes a severe blow not only to the prosecution case but also to

the cause of justice as irregularities, if any, committed in such T.I. parade cannot be canvassed and discussed by the trial Court in his absence from the witness box. In the present case, no plausible explanation has been offered as to why the Magistrate was not examined in the Court to prove the T.I. parade report. In the case in hand, the prosecution has proved the T.I. parade report through P.W.4, the informant who has stated that he had signed the T.I. parade report and accordingly, the report was marked as Ext.2 and the signature of P.W.4 was marked as Ext.2/1. Mere marking of the T.I. parade report is not enough inasmuch as the person who conducted the T.I. parade could only highlight what precautions he took, what procedure he followed during such T.I. parade. Lapses, if any, on his part during the proceedings of the T.I. parade which strikes at the root of the identification evidence, can be brought out by the defence counsel in the cross-examination. If the Magistrate is dead or his attendance could not be procured during trial for any reason, the trial Court has to specifically mention the same in the order-sheet and thereafter the prosecution can adduce cogent evidence to prove such T.I. parade report. Identification proceedings are not conducted for the pleasure of the prosecution. It has got a valuable purpose even though the identification test does not constitute substantive evidence.

There is absolutely no material on record against the appellants Baikuntha Bhoi and Prasanta Nayak except the confessional statement of the appellant Raju @ Rajesh Behera, which has been marked as Ext.4. No T.I. parade has also been conducted in respect of those two appellants and the informant has also not identified these two appellants in Court during trial.

P.W.4, the informant has stated that the accused persons took away his mobile phone and money purse from his pant pocket. He has not stated that his passport photograph was there in his money purse. He has not stated that the xerox copy of the matriculation certificate and original PAN allotment letter were taken away by the accused persons. He has also not stated that the money purse was having six nos. of hundred rupees notes. Even though as per the evidence of the I.O. (P.W.8), at the instance of the appellant Raju @ Rajesh Behera, one black colour money purse, passport photograph of P.W.4 and xerox copy of the matriculation certificate of P.W.4 and original PAN allotment letter and six nos. of hundred rupees notes, which were kept inside the money purse, were seized as per the seizure list (Ext.5), but since no T.I. parade has been conducted in respect of the money purse and even P.W.4 has not identified the money purse and other documents seized as per seizure list Ext.5 in Court during trial, recovery of such articles cannot be a

factor to hold the appellant Raju @ Rajesh Behera guilty. The articles seized under seizure list Ext.5 were marked as M.Os. when the I.O. (P.W.8) was examined.

Conclusion:

9. In view of the foregoing discussions, I am of the humble view that the impugned judgment and order of conviction is not sustainable in the eye of law. Accordingly, the same is hereby set aside. All the four appellants are acquitted of the charge under section 395 of I.P.C.

In the result, all the three criminal appeals are allowed. Since all the appellants are on bail, they are discharged from the liability of their bail bonds and surety bonds stood cancelled.

Lower Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

Before parting with the case, I would like to put on record my appreciation to Mr. Rashmi Ranjan Nayak, the learned Amicus Curiae who was engaged for the appellant Baikuntha Bhoi in CRLA No.21 of 2012 and the appellant Raju @ Rajesh Behera in CRLA No.719 of 2012 for rendering his valuable help and assistance in arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional fees in

respect of the aforesaid two appeals which is quantified at Rs.15,000/- (rupees fifteen thousand only).

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S.K. Sahoo, J.

Orissa High Court, Cuttack
The 4th April 2024/PKSahoo