

Araf Mulla, Vs. State

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Court : Orissa

Decided On : Aug-05-1997

Reported in : 1997(II)OLR247

Judge : P.K. Misra, J.

Acts : Indian Penal Code (IPC) - Sections 395, 397 and 457; Indian Explosives Act - Sections 27; Explosive Substances Act - Sections 9B

Appeal No. : Jail Criminal Appeal No. 198 of 1992 and Criminal Appeal No. 214 of 1992

Appellant : Araf Mulla, ;ramjan Seikh and Usman Mulla

Respondent : State

Advocate for Def. : Govt. Adv.

Advocate for Pet/Ap. : P.K. Dhal, D. Nayak, S. Swain, A. Ahad, H.K. Dash, R. Ch. Swain and P.K. Misra-3

Disposition : Appeal allowed

Judgement :

P.K. Misra, J.

1. Both the appeals arise out of the same Judgment and are being disposed of by one common order.
2. The three appellants were prosecuted under Sections 457 and 395 read with Section 397 of the Indian Penal Code (hereinafter referred to as the 'I.P.C.');
- under Section 27 of the Indian Explosives Act and 9B(b) of Explosive Substances Act, on the allegation that they have committed dacoity in the night of 21/22/12/1990 at Bargarh and taken away a cash amounting to Rs. 68,000/- and wrist watches from Sitaram Service Station (Petrol Pump). The three appellants have been convicted under Sections 457 and 392, I.P.C.; under Section 9-B(b) of the Indian Explosives Act and sentenced to undergo rigorous imprisonment for five years, nine years and one year respectively. All the sentences were directed to run concurrently.
3. The order of conviction was passed on the evidence of P.Ws. 1, 2, 3 and 5 who were the employees of the said Petrol Pump. Apart from the four eye witnesses, prosecution had examined P.W.4, the Magistrate, who had conducted the Test Identification Parade, P.W. 6, is the informant and the owner of the Petrol Pump and P.Ws. 7, 8, 9 and 10 were the Investigating Officers.
4. The plea of the accused persons was one of denial. It was stated by some of them that they had been arrested on 16.3.1991 but they were produced in Court on 22.3.1991.
5. P.W. 1 has implicated all the three accused persons in a general manner and has claimed that he had identified four culprits during the Test Identification Parade. The evidence of the Magistrate who held the Test Identification Parade, however, indicates that P.W. 1 had identified accused Araf and Ramjan during the Test Identification Parade. P.W.1 has admitted that he had seen the accused persons at Remuna Police Station. The trial Court, however held that it was not known as to whether P.W. 1 had seen the accused persons prior to the holding of the Test Identification Parade or thereafter. This witness has stated in Para-7 of his cross-examination that 'for the first time I saw the accused persons in Remuna Police Station.' He has also stated that he had gone to Bhandaripokhari Police Station but the three accused persons was not present there. Such evidence of P.W. 1 clearly indicates that the police was trying to show some of the suspects to

this witness, even prior to the actual holding of the Test Identification Parade. Though this witness had identified two accused persons, while deposing in Court he has implicated all the three accused persons in a general manner.

P.W. 2 has identified accused Ramjan in Court as well as in the Test Identification Parade. However, in cross-examination he has admitted that he had gone to Bhandaripokhari Police Station. Though he claims that he had not gone to Remuna Police Station and had not seen the accused, the very fact that he had gone to Bhandaripokhari police station along with P.W. 1 gives rise to suspicion that the police was trying to show the accused persons to the various eye-witnesses, even prior to the holding of the Test Identification Parade and as such, it would be unsafe to rely upon such evidence relating to identification without other incriminating circumstances against the accused persons.

P.W.3 has identified the accused Aral and Usman in Court and claims that he had identified both the accused persons in the Test Identification Parade whereas according to P.W.4, P.W.3 had identified accused Ramjan and Usman. In other words, accused Aral had not been identified by P.W.3 in the Test Identification Parade whereas accused Ramjan who had been identified by P.W. 3 in the Test Identification Parade, has not been identified by him in Court. He claims that 50 to 60 persons were standing along with the accused in the Test Identification Parade. However, such statement must be taken to be incorrect in view of the evidence of P.W 4 that he had mixed ten persons with each suspect P.W. 3 has stated that the persons were of different sizes and wearing different dresses. Having regard to all the above factors, it would be unsafe to rely upon the evidence of P.W. 3 without any other corroborating materials in support of the evidence.

P.W.5 has identified all the three accused persons. Though he admits that he knew that the accused persons were caught as the owner had disclosed about such fact, he claims that he saw the accused persons for the first time in the Test Identification Parade after they were caught. He denies to have gone to either Khantapara police station or Remuna police station and to Bhandaripokhari police station. However. P.W. 1 has stated that he (P.W.1) had gone to Bhandaripokhari police station along with P.Ws. 3 and 5. It is of course true, that P.W. 1 has also

stated that the accused persons were not there, but the fact remains that the witnesses were going from police station to police station obviously at the instance of the police to identify the suspects even before the actual Test Identification Parade was held.

From the materials on record it appears that Araf, one of the accused persons, was apprehended on 17.3.1991 and was produced before the Magistrate for the first time on 22.3.1991. This obviously indicate that after being apprehended, at least one of the accused persons was in police custody without being produced before the Court which gives rise to a reasonable suspicion that such accused was being kept by the police for the purpose of identification. In fact, even the trial Court has observed as if there was a 'mini Test Identification Parade' by the police though the Magistrate was not present. In view of the suspicious conduct of the prosecution in trying to get the suspects identified at police station even before holding the proper Test Identification Parade and other unconvincing features noticed earlier, it is very unsafe to rely upon the evidence of the eye-witnesses as there is no other material to implicate the accused persons in the crime.

6. In the result, the Criminal Appeals are allowed and the order of conviction and sentence is set aside.