Crl.A. 136/2010

BEFORE

THE HON’BLE MR. JUSTICE PARAN KUMAR PHUKAN

The conviction of the accused appellants, Sonti Borah and Kamal Duwarah by the learned Additional Sessions Judge (FTC), Biswanath Chariali, District- Sonitpur on 4.8.2010 in Sessions Case No. 223 of 2008 corresponding to GR Case No.220 of 2000 is the subject matter of challenge in this appeal.

2. The background facts necessary for disposal of this appeal are that these two appellants along with the other accused persons committed dacoity on the intervening night of 3.5.2000 in the house of the informant Subudh Dey by breaking open the door of his house and they looted valuable items such as gold ornaments, cloths, coins and cash and decamped with the booty. A written FIR was filed soon after the occurrence on the basis of which a case was registered and after completion of the investigation, charge sheet was submitted against the accused appellants and three other persons. On the conclusion of the trial, learned Additional Sessions Judge found the accused appellants guilty and accordingly convicted them and sentenced them to rigorous imprisonment for 3 years and to pay fine of Rs.5000/- in default to R.I. for another 30 days. The other accused persons were acquitted by the trial court. Accused appellants aggrieved by the judgment have preferred this appeal before this court challenging the legality of the judgment of the trial court.

3. The learned counsel appearing on behalf of the appellants submitted that the learned trial judge passed a patently illegal judgment on the basis of alleged recovery of some cloths and coins from the house of the appellant. It was next contended that the court should not have convicted them on the basis of the evidence of Investigating officer to the effect that recovery was made at the instance of the appellants, although, no statement of the accused has been proved in the case.

4. Controverting the submissions, the learned Additional Public Prosecutor submitted that recovery was made at the instance of the accused and were seized in the presence of witnesses. The seized materials were identified by the informant and his family members and the recovery of the articles from the possession of the appellants itself established beyond doubt that they committed dacoity in the house of the informant.

5. Before adverting to the submissions made by counsels, it would be appropriate to refer to the provision of Section -27 of the Evidence Act to ensure whether recovery of the articles was made at the instance of the accused/appellants and on being led by them. Section-27 of the Evidence Act provides that if a fact is discovered in consequence of information given some guarantee is afforded thereby that the information was true and consequently the said information can safely be allowed to be given in evidence because if such an information is further fortified and confirmed by the discovery of articles or the instrument of crime and which leads to the belief that the information about confession made as to the articles of crime then cannot be false. This is the view expressed by the Hon’ble Apex Court in the case of Golakananda Venkateswara Rao -vs- State of A.P. reported in (AIR 2003 SC 2846).

6. Essential ingredients of the Section are that the information given by accused must lead to the discovery of the fact which is the direct outcome of such information. In Bodhraj @ Bodha -vs- State of Jammu and Kashmir reported in (2003) SCC (Cri) 201, the Apex court observed that mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given.

7. The information provided by accused leading to discovery is to be proved and not the opinion found on it by the police officer. In the case in hand, the I.O. (PW-9) claims to have recovered some of the articles including some coins from the house of the appellants at their instance and on being shown by them. But the purported statements of the appellants have not been recorded and it was not tendered in evidence by the I.O.. The I.O. ,pw-9 claimed that the arrested accused Dhanmani Borah led him to the house of the appellants and recovery was made at their instances, those were seized, but strangely enough he has not recor

ded the statement of the accused leading to discovery and the same has not been proved before the court. The learned trial judge opined that since no application has been filed by appellants claiming the articles seized from their possession, they committed dacoity and looted the articles . He has come to the conclusion on the basis of the statements of the I.O. of the case. Cloths and coins or cash amount of smaller denominations are available almost in all houses. Mere recovery of such articles would not prove the complicity of the accused appellants in the commission of the crime. It is for the prosecution to prove that the appellants committed dacoity and looted such articles. Failure on the part of the accused/appellants to raise claim of the articles is not the ground to believe that they committed the dacoity.

8. Now turning to the evidence of the other witnesses, I have found that PW-1, 2, 8 and 10 could not say anything regarding the commission of dacoity and it appears that PW-1 and PW-2 put their signatures in the paper on being given to them by police. PW-3 who is the informant of the case also could not identify the dacoits. PW-4 claimed to have identity Dhanmani Borah at the time of commission of the dacoity but his evidence is not supported by his wife PW-5 who deposed that she and her husband could not identify the dacoits. It appears from the records that TIP was held for identification of the dacoits but evidence on records reveals that before TIP, the witnesses had the scope to see the accused in the police station which renders the TIP meaningless.

9. In a case of dacoity, the inmates of the house are the best witnesses and from their evidence if identification of the dacoits is established, conviction could be based on such identification. But in the instant case the inmates of the house could not recognize the dacoits since they covered their faces with black cloths. From mere recovery of the articles which are common articles found in every household, it cannot be said that the appellants committed dacoity. More particularly, when the purported discovery statements has not been tendered and proved during the trial of the case.

10. From what has been discussed above, I am of the view that learned Additional Sessions Judge hastily come to the finding that the appellants committed the dacoity on the basis of recovery of the articles from their possession. He has failed to properly appreciate the evidence on records and came to the finding because of failure of the appellants to raise claim over the articles. Consequently, I find and hold that the Judgment of the learned Additional Sessions Judge is liable to be set aside which I accordingly do.

11. The accused appellants are acquitted and set at liberty forthwith. The bail bonds stands discharged.

12. Send a copy of this judgment to the learned court below for information and necessary action.