IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No. 75 Of 2016

From the judgment and order dated 04.11.2016 passed by the learned Addl. Sessions Judge, Rourkela in Sessions Trial No.97 of 2011.

Jaganath Mundari ..... Appellant

-Versus-

State of Odisha ..... Respondent

For Appellant: - Ms. Mandakini Panda

For State: - Mr. Sibani Sankar Pradhan
Addl. Govt. Advocate

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 15.07.2021

S.K. SAHOO, J. The appellant Jaganath Mundari faced trial in the Court of learned First Addl. Sessions Judge, Rourkela in Sessions Trial No.97 of 2011 for offences punishable under sections 399 and 402 of the Indian Penal Code on the accusation that on 11.07.2010 at about 11.00 p.m., he along with others were

found assembled near DAV Public School field, Rourkela by keeping a Bolero jeep for the purpose of committing dacoity and making preparation for the said purpose.

The learned Trial Court vide impugned judgment and order dated 04.11.2016 found the appellant guilty of both the charges and sentenced him to undergo rigorous imprisonment for five years and to pay a fine of Rs.2,000/- (rupees two thousand), in default, to undergo rigorous imprisonment for three months more for the offence under section 399 of the Indian Penal Code and rigorous imprisonment for three years and to pay a fine of Rs.1,000/- (rupees one thousand), in default, to undergo rigorous imprisonment for two months more for the offence under section 402 of the Indian Penal Code and both the sentences were directed to run concurrently.

2. The prosecution case, in short, as per the first information report lodged by Sadananda Pujahari (P.W.6), Inspector of Police, Uditnagar police station is that on 11.07.2010 at about 11.00 p.m. he received reliable information from his sources that some unknown persons had assembled in DAV Public School field keeping Bolero vehicle by their side and were planning to commit dacoity in the house of Principal, DAV Public School. Getting such information, P.W.6 entered the fact

in the Station Diary and in order to verify the veracity of the information, he along with other police officials rushed to the spot by police jeep. On the way to the spot, P.W.6 took two independent witnesses with them and they arrived at the spot at about 11.30 p.m. and found a group of persons were discussing among themselves by the side of a Bolero vehicle by burning a candle. They rounded them up and apprehended five persons. Being asked, the persons assembled disclosed their identity and one of them was the appellant Jaganath Mundari and they could not account for their presence at such an odd hour of night. On personal search of those persons, three black masks were found from the possession of the appellant and from possession of others, two billhooks (katuri), black masks and one screwdriver were found and those articles along with one half burnt candle, match box and the Bolero vehicle were seized and seizure lists were prepared. P.W.6 drew up a plain paper F.I.R. at the spot, which was ultimately registered as Uditnagar P.S. Case No.72 dated 12.07.2010.

P.W.7 Tusil Majhi, S.I. of Police attached to Uditnagar police station took up investigation of the case as per the direction of P.W.6 and after preparation of seizure lists of different articles including three black masks from the

possession of the appellant under seizure list Ext.8, the apprehended persons including the appellant and the incriminating materials were brought to the police station. During course of investigation, P.W.7 examined the witnesses and forwarded the accused persons to the Court and on completion of the formalities of investigation, finding prima facie against the accused persons, he submitted charge sheet against the appellant as well as one David Kandulana, whose case was splitted up as he absconded while on bail and three children in conflict with law. The appellant was charge sheeted under sections 399 and 402 of the Indian Penal Code.

3. After submission of charge sheet and commitment of the case to the Court of Session, the learned trial Court framed charges against the appellant under sections 399 and 402 of Indian Penal Code on 01.10.2011 and since the appellant refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

4. The defence plea of the appellant is one of denial.

5. During course of trial, in order to prove its case, the prosecution examined as many as seven witnesses.

P.W.1 Surendra Nath Mallik was the constable attached to Uditnagar police station who stated about the seizure of vehicle and its documents under seizure list Ext.1.

P.W.2 Prafulla Kumar Sahu was the A.S.I. of Police attached to Uditnagar police station who stated about the seizure of station diary under seizure list Ext.2 which was given in his zima vide Ext.3.

P.W.3 Sk. Abdul Kalim was a Homeguard and driver attached to Uditnagar police station who stated that he along with the I.I.C. and other police officials proceeded to the spot in a police jeep which was driven by him and they arrived at the DAV Public School field where they found parking of white colour Bolero vehicle and five persons were sitting there and when they were surrounded, they disclosed their names and some incriminating articles were seized from their possession and he also stated that the black colour cloths for using as mask were recovered from the appellant.

P.W.4 Suleman Xess was the Constable attached to Uditnagar police station who stated that he produced the sanction order vide Ext.4.

P.W.5 Banamali Bej was the S.I. of Police attached to Uditnagar police station who stated about the presence of the

appellant at the spot along with other co-accused persons and seizure of black cloth pieces, katari etc. from the possession of different accused persons.

P.W.6 Sadananda Pujahari was the I.I.C. attached to Uditnagar police station who stated that he came to the spot along with other police officials and apprehended five accused persons including the appellant. He further stated about the seizure of three black masks from the possession of the appellant and other incriminating articles from the co-accused persons.

P.W.7 Tusil Majhi was the Sub-Inspector of Police attached to Uditnagar police station and he is the investigating officer of the case.

The prosecution exhibited twelve numbers of documents. Exts.1, 2, 5, 6, 7, 8, 9 and 10 are the seizure lists, Ext.3 is the zimanama, Ext.4 is the sanction order, Ext.11 is the first information report and Ext.12 is the xerox copy of the first information report of Bounsejore police station.

The prosecution also proved ten material objects. M.Os.I and II are the Katuries, M.O.III is the screw driver, M.Os.IV to VIII are the masks, M.O.IX is the half burnt candle and M.O.X is the match box.

6. The learned trial Court on the basis of materials available on record came to hold that since the members of the gang had assembled in the dead hour of night near a lonely place and were armed with deadly weapons and black masks and a screwdriver, which is normally used to open houses and had actually proceeded to a place nearer to the scene of the contemplated dacoity i.e. the house of the Principal of the DAV Public School, it is to be inferred that it was not a case of mere assemblage of persons but the members of the gang gathered and were ready for the actual commission of the crime.

7. Ms. Mandakini Panda, learned counsel for the appellant contended that even though in the first information report, it is mentioned that independent witnesses also accompanied the police party to the spot but none of them have been examined but the conviction of the appellant is based on the evidence of official witnesses. She argued that merely because three masks were found from the possession of the appellant and one screw diver, two billhooks and other articles were found from the possession of other co-accused persons, it cannot be said that the prosecution has successfully established the charges against the appellant under sections 399 and 402 of the Indian Penal Code.

Mr. Sibani Sankar Pradhan, learned Additional Government Advocate for the State, on the other hand, supported the impugned judgment and argued that it cannot be said that merely because the prosecution witnesses are all official witnesses, no conviction can be sustained basing on their evidence particularly when no contradictions are appearing in their evidence. The facts proved by the evidence and the prosecution witnesses give rise to a reasonable inference of the fact that the appellant and other accused persons had assembled for the purpose of committing dacoity and that in preparation for the same, they had brought black masks, arms, screwdriver with them and the said inference does not appear to have been rebutted by the appellant. If the appellant had assembled there for any other purpose, it was within his knowledge which he could have explained, but the appellant has not adduced any evidence to show that it was his lawful assemblage at that place. The appellant did not show that the object for which he had assembled was not that of committing dacoity and therefore, the appeal should be dismissed.

8. Before adverting to the contentions raised by the learned counsel for the respective parties, while going through the evidence of the witnesses, it appears that P.W.1 Surendra

Nath Mallik stated about the seizure of the vehicle and its documents under seizure list (Ext.1), P.W.2 Prafulla Kumar Sahu stated about the seizure of station diary entry which was given in his zima. P.W.3 stated that he along with the I.I.C. and other police officials proceeded to the spot in a police jeep which was driven by him and they arrived at the DAV school field where they found parking of white colour Bolero vehicle and five persons were sitting there and when they were surrounded, they disclosed their names and some incriminating articles were seized from their possession. He specifically stated that black colour cloths for using as masks were recovered from the appellant. P.W.5 stated about his arrival at the spot on the date of occurrence at about 11.30 p.m. and he also stated about the presence of the appellant at the spot along with other co-accused persons and seizure of black cloth pieces, katari etc. from the possession of different accused persons. P.W.6, the I.I.C. of Uditnagar police station stated about the apprehension of the five accused persons including the appellant at the spot and also about the seizure of three black masks from the possession of the appellant and other incriminating articles from the co-accused persons. P.W.7, the Investigating Officer also stated to have accompanied P.W.6 and others to the spot and he

has also stated in a similar manner like P.W.3, P.W.5 and P.W.6 regarding the seizure of black masks from the possession of the appellant. Even though on the seizure of black masks from the possession of the appellant, nothing has been brought out in the cross-examination in the evidence of any of the witnesses to disbelieve the same and the presence of the appellant in the scene of occurrence is also established through the evidence of the official witnesses, the question which comes up for consideration is, can it be said on the basis of the available materials on record that the ingredients of the offences under section 399 and 402 of the Indian Penal Code are satisfied.

9. Section 399 of the Indian Penal Code deals with making preparation to commit dacoity and section 402 of the Indian Penal Code deals with assembling for purpose of committing dacoity. There is manifestly a distinction between the offences under section 399 and section 402 of the Indian Penal Code. The offence under section 402 of the Indian Penal Code is complete as soon as five or more persons assemble together for the purpose of committing a dacoity. Preparation for committing a dacoity may take place before or after the dacoits assemble together. Preparation consists in devising or arranging the means necessary for the commission of an offence. Though the

offence falling under section 402 of the Indian Penal Code and the offence falling under section 399 of the Indian Penal Code would probably involve almost similar ingredients, the only difference is that under section 402 of the Indian Penal Code, mere assembly without any preparation is enough to attract the offence, whereas section 399 of the Indian Penal Code is attracted only if some additional steps are taken in the course of preparation.

In an identical factual scenario, in the case of **Chaturi Yadav and others -Vrs.- State of Bihar reported in A.I.R. 1979 Supreme Court 1412**, wherein the accused persons were found assembled at a lonely place in the school premises, who were detected by the police patrol party and on seeing the police party, some of the accused persons ran away but some of the accused persons were caught and from their possession, guns and live cartridges were found and they were found guilty by the learned trial Court under sections 399/402 of the Indian Penal Code and their conviction were confirmed in appeal by the Patna High Court but their Special Leave to Appeal was allowed by the Hon'ble Supreme Court and the judgment of the conviction was set aside and the appellants were acquitted of

all the charges. The relevant portion of the decision is quoted herein below:

> "4. The Courts below have drawn the inference that the appellants were guilty under both the offences merely from the fact that they had assembled at a lonely place at 1 a.m. and could give no explanation for their presence at that odd hour of the night. Mr. Misra appearing for the appellant submitted that taking the prosecution case at its face value, there is no evidence to show that the appellants had assembled for the purpose of committing a dacoity or they had made any preparation for committing the same. We are of the opinion that the contention raised by the learned counsel for the appellants is well founded and must prevail. The evidence led by the prosecution merely shows that eight persons were found in the school premises. Some of them were armed with guns, some had cartridges and others ran away. The mere fact that these persons were found at 1 a.m. does not, by itself, prove the appellants had assembled for the purpose of committing dacoity or for making preparations to accomplish that object. The High Court itself, has in its judgment, observed that the school was quite close to the market, hence it is difficult to believe that the appellants would assemble at such a conspicuous place with the intention of

committing a dacoity and would take such a grave risk. It is true that some of the appellants who were caught hold of by the Head Constable are alleged to have made the statement before him that they were going to commit a dacoity but this statement being clearly inadmissible has to be excluded from consideration. In this view of the matter, there is no legal evidence to support the charge under Sections 399 and 402 against the appellants. The possibility that the appellants may have collected for the purpose of murdering somebody or committing some other offence cannot be safely eliminated. In these circumstances, therefore, we are unable to sustain the judgment of the High Court."

10. Though merely because the independent witnesses were not examined, the evidence of the official witnesses cannot be discarded and even though in view of the available materials on record, it can be said that the prosecution has successfully established that the appellant along with four other persons assembled in a lonely place i.e. the field of DAV Public School in the odd hour of night i.e. around 11.00 p.m. on 11.07.2010 and from the possession of the appellant, three black masks were seized and from the possession of the co-accused persons, axe, screwdriver and other incriminating materials were found, but in my humble view, that by itself cannot be sufficient to hold that

that the appellant had assembled there for the purpose of committing dacoity or was making preparation to accomplish that object. It cannot be said that the articles seized from the possession of the appellant and the co-accused persons can be utilised only for the purpose of committing dacoity and for no other offence. The prosecution must prove from the evidence directly or indirectly or from attending circumstances that the accused persons had assembled for no other purpose than to make preparation for commission of dacoity. If the evidence falls short of it, the case must fail. It is for the prosecution to establish that the appellant had conceived a design for committing dacoity. Of course, if the legitimate inference can be drawn from the circumstances which are established in the case that the appellant and other accused persons had the intention to commit dacoity, it will be for them to prove that their intention was different. The aid of section 106 of the Evidence Act can be taken in a criminal trial only when the prosecution has led evidence which, if believed, will sustain a conviction or which makes out a prima facie case. Unless this is done, no burden of proving anything would lie on the accused. If there is any fallacy in explaining his position on the part of the appellant, that would not absolve the prosecution from its primary

obligation to make out a prima facie case under sections 399 and 402 of the Indian Penal Code against the appellant. The possibility that the appellant and other accused persons getting assembled for committing some other offences at that point of time cannot be safely eliminated. In view of the foregoing discussions, it is very difficult to accept that the prosecution has successfully established the charges against the appellant and therefore, the impugned judgment and order of conviction cannot be sustained in the eye of law.

Accordingly, the Jail Criminal Appeal is allowed. The impugned judgment and order of conviction of the appellant and the sentence passed thereunder is hereby set aside and the appellant is acquitted of the charges under sections 399 and 402 of the Indian Penal Code.

It appears that the appellant was forwarded to Court after his arrest on 12.07.2010 and he was also released on bail but after his conviction, he was sent to judicial custody by the learned trial Court on 04.11.2016. It further appears that he has not moved any application for bail in this appeal. The appellant shall be set at liberty forthwith, if his detention is not otherwise required in any other case.

Lower Court Records with a copy of this judgment be sent down to the learned trial Court forthwith for information and necessary action.

.....
S.K. Sahoo, J.

Orissa High Court, Cuttack
The 15th July, 2021/RKMishra