

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.147 of 1990

Md. Sharif Khan (since dead) Appellant/s
Versus
The State of Bihar Respondent/s
with

Criminal Appeal (DB) No. 113 of 1990

2. Haroon Khan, son of Bashir Khan, resident of Village- Mianpur, Tilangahi, P.S. Bairiya, District- West Champaran
2. Pappu Mian, son of Shafayat Hussain, resident of village Shivrajpur, P.S. Nautan, District- West Champaran Appellant/s
Versus
The State of Bihar Respondent/s
with

Criminal Appeal (DB) No. 129 of 1990

1. Aftab Khan
2. Feroj Khan, sons of Sharif Khan
3. Altullah Dewan, son of Sarfaroze Dewan
4. Shafiullah Dewan, son of Ali Hussain
5. Mansoor Khan, son of Late Bashir Khan,
All residents of village Myapur, Tilangahi, Police Station Bairnia,
District, West Champaran Appellant/s
Versus
..... Respondent/s

(Against the Judgment and order dated 28.2.1990, passed in Sessions Trial No.121/86, G.R. No.964/81, by 4th Additional Sessions Judge, Bettiah)

Appearance :
(In CR. APP (DB) No. 147 of 1990)
For the Appellant/s : Shri Chitranjan Sinha, Sr. Adv.
Smt. Shama Sinha, Adv.
For the Respondent/s : Dr. Mayanand Jha, Adv.
(In CR. APP (DB) No. 113 of 1990)

For the Appellant/s : Shri Chitranjan Sinha, Sr. Adv.
Smt. Shama Sinha, Adv.

For the Respondent/s : Dr. Mayanand Jha, Adv.

(In CR. APP (DB) No. 129 of 1990)

For the Appellant/s : Mr. Yogesh Chandra Verma, Sr. Adv.
Shri Amarendra Nath Verma, Adv.
Shri Rama Kant Singh, Adv.

For the Respondent/s : Dr. Mayanand Jha, A.P.P.

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE SUDHIR SINGH

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 15-05-2015

As many as 14 persons were put to trial in T.R.

No.121/86, on the file of 4th Additional Sessions Judge, Bettiah, West Champaran. It was in relation to the death/murder of one Mr. Aash Mohammd of Mianpur Tilangi, P.S. Baira of West Champaran District. The fardbeyan in relation to that incident was recorded from P.W.5, one of the brothers of the deceased, at 8:00 a.m. on 4.8.1981. He stated that in the midnight of 3rd and 4th August, 1981, when he was sleeping in his house and his brother slept in his house in the neighbourhood, a group of persons knocked the door, taking the name of himself and the deceased and when the door was opened, 30 to 35 persons forced in. He stated that he could identify all the accused in the light of the torch held by one of them and the lamp in the house. The assailants are said to have dragged the deceased and one of them was the Mukhiya of



the village i.e. accused No.1. It was stated that the wife of the deceased i.e. P.W.2, implored the accused No.1, to spare the life of her husband but not heading to the request, the assailants have taken away the deceased. He further stated that while taking away the deceased, the assailants declared that they would put him to death and if anybody raises voice, they would also be put to death. P.W.5 and some of the villagers are said to have accompanied the assailants up to some distance, and they returned, when gun shot was fired in the air.

The dead body of the deceased is said to have been recovered later on. On receiving information about it, P.W.8, the Investigating Officer, recovered the body, caused the inquest and post mortem. Thereafter, the charge-sheet was filed.

The trial court framed charges and on the accused pleading not guilty, trial was conducted wherein 8 P.Ws. were examined and certain documents were filed.

Through its judgment, the trial court convicted Accused Nos.3 to 5, 8, 9 to 11 and 15, for the offence punishable under Sections-302/149 of I.P.C. and sentenced them to undergo imprisonment for life. Fine was also imposed and alternative sentence for default in

payment of fine was indicated. Rest of the accused were acquitted by giving benefit of doubt.

Accused No.3 filed Criminal Appeal No.147/90. Accused Nos.9 and 15 filed Criminal Appeal No.113/90 and Accused Nos.4, 5, 8, 10 and 11 filed Criminal Appeal No.129/90. Since the sole appellant in Criminal Appeal No.147/90 died during the pendency of the Appeal, the same was closed as abated.

Smt. Shama Sinha, learned counsel for the appellants, submits that there is any amount of inconsistency in the evidence adduced by the prosecution and P.W.1, who is none other than the brother of the deceased, was declared hostile. She contends that P.W.2, the wife of the deceased, did not even mention the presence of P.W.5 and she has belied the very contents of the fardbeyan, when it was elicited from her that the wife of P.W.5 was not there in the village, when the incident took place. She contends that the mother of the deceased, P.W.3, also did not speak about the presence of P.W.5 and her statement that she too accompanied the villagers when the assailants were taking her son, was not even mentioned in the fardbeyan. Learned counsel further submits that the evidence of P.Ws. 4 and 6 is, on the face of it, unreliable

and P.W.8 did not explain as to what steps he had taken, after receiving the information about the deceased having been taken away by the assailants.

Sri Mayanand Jha, learned Addl. Public Prosecutor, on the other hand, submits that the entire event, those witnessed as family members of the deceased and the Fardbeyan of P.W.5, is narrative of the incident. He contends that evidence of P.W.5 as to the contents of the Fardbeyan and that evidence in turn is corroborated by the deposition of other witnesses. Learned counsel submits that mere fact that P.W.1 was declared hostile does not make much of difference. He further submits that P.W.8, the Investigating Officer, has furnished a detailed account of the entire crime and the trial Court had arrived at the correct and proper conclusions.

The incident of attack on Aash Mohammad is said to have taken place in the night intervening 3rd and 4th August, 1981. P.Ws. 1 & 5 are the brothers of the deceased whereas P.W.2 is his wife and P.W.3 is his mother. It is submitted that the house of the deceased and his brothers are in a row. Nearly 30-35 persons are said to have come and dragged away Aash Mohammad. It is important to note that though the incident has taken place in the midnight,



no complaint was made in the police station even up to 8:00 O'clock in the morning. It is only when police came to the village that the statement of P.W.8 was recorded. The basis for including the name of the appellants alone when 30-35 are said to have abducted Aash Mohammad is not known. P.W.5 stated that he was able to recognize all the assailants in the light of the torch and the lamp that was there in the house. However, he did not attribute any specific acts to the appellants herein.

The evidence of P.Ws. 2 & 3, the wife and the mother respectively presumes importance since they were in the company of Aash Mohammad till he is said to have been abducted. These two witnesses, however, did not speak about the presence of P.W.5. Assuming that there was lapses on the part of the prosecution in eliciting proper information from those two witnesses, the evidence of P.W.1, another brother of the deceased, becomes relevant. He too was cited almost as an eye witness, however he did not support the case of prosecution and the Court declared him hostile on the request made by the prosecution. In the cross-examination, nothing material was elicited from him.

If the version of P.W.5 is to be accepted, he identified almost all the assailants and one of them was the



Mukhiya of the village. This is not the case where an incident of murder has taken place on the spot. When the assailants are said to have been taken away the deceased Aash Mohammad proclaiming that they would kill him and P.W. 5 identified them, there should not have been any difficulty in getting the assailants nabbed by approaching the police. Except stating that they himself and others accompanied the assailants but returned when they were threatened, he did not state as to what steps had been taken to rescue his brother Aash Mohammad. P.W.8 is also silent in this regard. He has simply stated that the statement of P.Ws. 1, 2, 3 & 5 are recorded and that the assailants were absconding. It was two days thereafter when the body is said to have been recovered. The evidence of P.W.8 discloses that first he saw the blood stained earth nearby a river, and he collected sample of the same for analysis. He admit in the cross examination that the case diary does not contain any requisition to the laboratory for analyzing the sample. The body is said to have been kept in a gunny bag which was tied to another bag with sand and flown into river. Even according to the witness, the body was in putrefied and mutilated condition nor any post mortem worth its name was conducted. The appellants are

implicated only on the basis of the so called identification by P.W.5 at the time of the alleged abduction.

It has already been pointed out that when 30-35 persons were said to have abducted the deceased in the middle of the night, the basis on which the appellants alone are implicated is not forthcoming. Even if there is a peaceful gathering of 30-35 persons in the night, an individual being acquainted with all of them would not be able to identify them. The situation that was prevailing when a serious act of abduction was taking place can easily be imagined. Therefore, it is difficult to accept the evidence of P.W.5 as regards identification of the appellants herein.

It is not uncommon that some witnesses turn hostile, and the mere fact that one of the witnesses turned hostile does not make much difference if the other evidence is strong enough. Further, the status of the witness who turned hostile is also important. If he is a third party, unrelated to the victim or his family, it can be assumed that such witness has been managed by the accused. In the instant case, P.W.1 is none other than the brother of the deceased. It was not even alleged that he has been managed by the appellants. Added to this, P.Ws.2 & 3 did not speak about the presence of P.W.5. Further, the

statement was recorded only after the police reached the spot and no formal complaint was filed. Assuming that the deceased, Aash Mohammad was abducted by the appellants or someone else, the occasion to convict would arise if only the act of killing that individual by them is proved. The evidence is totally absent in this behalf.

The Appeals are accordingly allowed and the conviction and sentence ordered by the trial court against the appellants is set aside. The appellants are already on bail. Bail-bonds executed by the appellants shall stand cancelled.

(L. Narasimha Reddy,CJ)

(Sudhir Singh, J)

K.C.jha/-
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