

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.330 of 1992

Against the judgment of conviction and order of sentence passed by
Shri Ranjee Pandey, 5th Additional Sessions Judge, Samastipur in
Sessions Trial No. 250 of 1989/69 of 1991.

Kamleshwar Choudhary son of Surya Narayan Choudhary resident of village
Chandpura P.S. Patori District Samastipur.

.... Appellant

Versus

The State of Bihar

.... Respondent

with

Criminal Appeal (DB) No. 332 of 1992

Bhubneshwar Choudhary son of Surya Narayan Choudhary resident of village
Chandpura P.S. Patori District Samastipur.

.... Appellant

Versus

State of Bihar

.... Respondent

Appearance :

(In CR. APP (DB) No. 330 of 1992 and CR. APP (DB) No. 332 of 1992)

For the Appellant/s : Mr. N.A. Shamsi, Adv.

Mr. Neeraj Kumar@ Samidh

For the State : Mr. Mr. Ajay Mishra

For the informant : Mr. Mr. Murari Narain Choudhary, Adv.

Mr. Ashok Kumar, Adv.

Mr. Surendar Prasad Singh, Adv.

CORAM: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH

and

HONOURABLE JUSTICE SMT. ANJANA MISHRA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH)

Date: 15-01-2015

The present appeal by the two appellants, who are brothers and
sons of Surya Narayan Choudhary, has been filed against the judgment
and order of conviction and sentence dated 30.06.1992 passed by the 5th
Additional Sessions Judge, Samastipur in Sessions Trial No. 250 of

1989 /69 of 1991, by which the appellants have been found guilty for the offences punishable under Sections 148 and 302/149 of the Indian Penal Code (for short 'IPC') and sentenced to undergo imprisonment for life for the offences under Sections 302/149 IPC and further two years in respect of offences under Section 148 IPC. However, the sentences have been ordered to run concurrently.

2. We have heard learned counsel for the appellants and Sri A.K. Mishra, learned APP, who was also instructed by the informant. We have perused the evidence in detail.

3. The prosecution case is based upon fardbeyan of the informant Umesh Choudhary (P.W. 9), who happens to be the son of the deceased, Satya Narayan Choudhary, which was recorded at about 1.30 pm on 23.05.1988 by A.S.I. Rajendra Prasad Singh. It may be noted here itself that this A.S.I. Rajendra Prasad Singh had not been examined in the Court and Paras Nath Paswan, Officer-in-charge of Patori P.S. Case, who had conducted the substantial part of investigation, had been examined as P.W. 11. P.W. 11 had clearly stated that Rajendra Prasad Singh had been killed in encounter. In the fardbeyan Ext. 3 it is alleged that in the morning at about 7 am of 23.05.1988, the informant and his father, who were coming from another village, were walking across the orchard of one Nand Kishore Thakur, where all of a sudden the two appellants and their father Surya Narayan Choudhary and Jahendra Paswan both sons of Sukhdeo



Paswan surrounded his father. They were variously armed with Garasa, Farsa and Tengari. They started brutally assaulting his father, who fell down. People, who were in the vicinity, namely, P.W. 1 Nagendra Rai, P.W. 2 Arjun Thakur, P. W. 4 Ram Lal Thakur, P.W. 5 Ram Ratan Rai rushed and witnessed the assault. None of them could do anything. The accused persons made sure that the informant's father was dead. The reasons for this brutal attack was previous enmity. On police being informed, Police Station being 15 kms away ASI Rajendra Prasad Singh came and recorded the fardbeyan, prepared inquest report, seized blood stained mud from the place of occurrence and took statements of witnesses present. Upon disclosure of the name of the appellants, Bhubneshwar Choudhary was thus arrested and from his bathan, blood stained Garasa, Farsa and Tengari were seized. Apparently, at this stage the Officer-in-Charge, Paras Nath Paswan (P.W. 11) rushed and took over the investigation and having completed the investigation, filed charge-sheet against five persons under Sections 148 and 302/149 of the Indian Penal Code, showing the father of the appellants, Mahendra Paswan and Jahendra Paswan as absconder. Learned Magistrate took cognizance of the offence and accordingly, committed the case to the court of session. Charges were framed against the two appellants as the rest were absconding. They pleaded innocence and as such they were tried. Upon conclusion of the trial, they were convicted. Hence the appeal.

4. As noticed earlier, apart from the informant, there are four eye-witnesses as mentioned in the FIR itself and they have been examined in Court i.e., P. W. 1 Nagendra Roy, P.W. 2 Arjun Thakur, P.W. 4 Ram Lal Thakur and P.W. 5 Ram Ratan Rai. Learned counsel for the appellants submits that their evidences cannot be relied upon. They were, in fact, not present at the place of occurrence. They are mere chance witnesses.

5. We have considered the matter and are unable to agree with the learned counsel. Firstly, we must note that they have been named in the fardbeyan itself at the earliest point of time. Secondly, their evidences are consistent and there is nothing to show that they were not present. We will notice their evidences in greater details. In regard to their evidence as chance witnesses, according to our understanding, a chance witness would be a person, who would normally not be expected at the place of occurrence. He could be witness planted by the prosecution. But in the present case, none of these four witnesses can be said to be chance witnesses as one of them is said to have been grazing his bufallow, which is not unnatural or abnormal. The orchard being near a village and agricultural field all around, it cannot be said that he was a chance witness in that sense. Similarly, P.Ws. 1, 2 and 4 were cutting grass in around the orchard in the morning, which again is neither abnormal nor unusual. These are normal activities being done at reasonable time. Their presence can not



be doubted in any manner and we see no reason to doubt their presence. Coming to their testimony, all of them have clearly stated that on alarm being raised, they being not far from the Orchard, rushed to the orchard. They clearly said that two appellants and three others (absconders) mercilessly assaulted the deceased ensuring his death. They all said that after virtually killing the deceased they dragged him to a nearby ditch and escaped. Learned counsel for the appellants states that if we read line by line the evidences of four purported eye-witnesses, we would find that they have not clearly stated as to which injury could be attributable to which of the accused persons. Firstly we must note that the fardbeyan, on the basis of which the FIR was registered, is not an encyclopedia or an anthology of all minute details. When we come to the evidence of eye-witnesses, we find that it was one person, who was assaulted repeatedly mercilessly by five persons variously armed. It is naturally not possible for each of the witnesses, who were at different places around the orchard, to narrate the event having seen from different sides in the same manner. It depends on perception and on his own memory. Graphical details and exact repetition itself would create doubt and often this argument that the witnesses have made parrot like statement, appeared to be tutored. If we look to the evidences one by one of all these four witnesses, they are basically consistent and there is nothing to doubt it. Thereafter, when we come to the evidence of the informant (P.W 9), his statement



is completely corroborated by these four eye-witnesses. Thus, the evidence of the four eye-witnesses being consistent in material particulars, we see no reason to disbelieve or doubt the fact that five persons, variously armed with farsa, garasa, tengari and lathi, came and fatally assaulted the deceased. Post-mortem, which has been conducted by the Doctor (P.W.7), clearly shows the extent of injuries. There are multiple grievous injuries on the hand, shoulder and neck. These injuries clearly show and establish intention to kill. Thus, the fact established by the prosecution, is that the deceased was surrounded by the five accused persons including two appellants, who were variously armed and in a premeditated manner, have fatally assaulted the deceased, causing his death on the spot, and having made sure that he was dead, they escaped. The weapons i.e., Garasa and Tengari were also recovered from the bathan of the appellant Bhubneshwar Choudhary with blood stains within hours of the occurrence. All these taken together, in our view, point towards the guilt of the appellants. In deference to learned counsel for the appellants, we must note a last desperate argument. He points out that in the FIR what is alleged is that the deceased was assaulted in the orchard but when we come to the ocular evidence of the five eye-witness they now develop the story further that after killing, the body was dragged some distance and dumped in a ditch. At first impression this appears to be a bit exaggeration or different from the original version. Reliance was



placed on the judgment of the Apex Court in the case of **Arulvelu & Anr. v. State & Anr**, since reported in **2010 (1) Cr. L.J.R 433**. In the said case it has been inter alia, held that if there is material inconsistency between the fardbeyan and the evidence in Court, unless there is any explanation forthcoming, it has to be assumed that the firdbeyan did not disclose the true facts. It has to be held that the credibility of evidence becomes questionable. In order to appreciate this submission, we have once again looked into the evidence as noticed above. The fardbeyan does not have to be either an encyclopedia or anthology of every minute details. The evidence that comes in Court in the present case is that after the accused was fatally beaten and assaulted he was dragged and his body was dumped in a ditch. On closer scrutiny of evidence, we find that this ditch is not some place, outside the small orchard but is within the orchard itself. The material places of occurrence as stated in the fardbeyan are consistent. The variance is not so such as to discredit the prosecution version. The deceased was assaulted, killed and abandoned within the orchard. Therefore, we are unable to accept the plea of the learned counsel for the appellants.

6. Then on behalf of the appellants, it is submitted that the enmity between the parties is longstanding which could be a reason for false implication. Our answer to this submission is clear. No one disputes enmity between the parties. But enmity is not one way. It cuts

both ways. Merely because there is enmity between the parties, it cannot be assumed or said that as a consequence of enmity, the prosecution case must fail. Mere previous enmity would not create doubt or give reason for false implication. Defence has not given inconsistent suggestion with regard to false implication or the event having taken place in a different manner by different persons. Only to one witness a suggestion was made that the deceased was a criminal and had been killed by someone else. Nothing has been brought on record to suggest even the criminal antecedent of the deceased.

7. In view of the matter, we have no option but to hold that the prosecution has succeeded in proving the guilt of the appellants.

8. Learned counsel for the appellants then points out that the appellants have already been in custody for almost nine years when they were ultimately granted bail by this Court pending final hearing. He points out that the incident is almost 26 years old and the appellants, who were then young, now they would be about 50 years. This Court should take a compassionate view. We are unable even to think on that line for the simple reason that the appellants having been found guilty under Sections 302/149 IPC it does not give any discretion to the Court to award a lesser sentence than life imprisonment, or capital punishment in appropriate cases. We have no option but to uphold the sentence of rigorous imprisonment for life as, undoubtedly, it is not a case for the extreme penalty of death sentence.

9. In that view of the matter, the appeal is dismissed and the impugned judgment of conviction and order of sentence dated 30.06.1992 passed by the trial Court against the appellants are hereby affirmed. Since the appellants are on bail, they must surrender in the Court below within a period of one month from today. Their bail bonds are cancelled. Let the lower court records be returned to the trial court forthwith for necessary action in this regard.

(Navaniti Prasad Singh, J)

(Anjana Mishra, J)

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