

Criminal Appeal (DB) No 323 of 1992

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- 1 Kapildeo Rai, son of late Sitaram Rai, resident of Village – Bahrapur, PS – Raghapur, District – Vaishali at present resident of Mosallahpur in the Town of Patna, PO – Pirbahore, District – Patna
 - 2 Ram Khelawan Rai, son of late Gangajal Rai, resident of Village – Saidabad, PS – Raghapur, District - Vaishali

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

WITH

Criminal Appeal (DB) No 342 of 1992

- =====
- 1 Paltoo Rai, son of late Ramdeo Rai
 - 2 Harbanshu Rai, son of Nagina Rai
 - 3 Aklu Chamar, son of late Narayan Chamar
 - 4 Shital Rai, son of late Ganeshi Rai
 - 5 Ganni Rai
 - 6 Nanda Rai
 - 7 Bala Rai, sons of Jagjiwan Rai
 - 8 Upendra Rai, son of Sri Ganni Rai
 - 9 Sakaldip Rai, son of Sri Shital Rai
 - 10 Chanarik Rai, son of Sri Jitan Rai
 - 11 Jitan Rai, son of late Ramdeo Rai, residents of Village – Bahrapur, PS – Raghapur, District - Vaishali

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

WITH

Criminal Appeal (DB) No 407 of 1992

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Nagina Rai, son of late Lakhan Rai of Village – Bahrapur, Police Station – Raghapur, District - Vaishali

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Against the judgment of conviction and order of sentence dated 18.08.1992 passed by Shri Madan Mohan Chaudhary, Additional Sessions Judge V, Vaishali at Hajipur in Sessions Trial No 419 of 1989.

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For the Appellant/s : Mr Prabhat Kumar &
Ms Madhuri Kumari, Advocates

For the State : Mr Ajay Mishra, APP

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CORAM: HON'BLE MR JUSTICE NAVANITI PRASAD SINGH

And

HON'BLE JUSTICE SMT ANJANA MISHRA

ORAL JUDGMENT

(Per: HON'BLE MR JUSTICE NAVANITI PRASAD SINGH)

These three appeals have been filed against the judgment of conviction and order of sentence dated 18.08.1992 passed by the Additional Sessions Judge V, Vaishali at Hajipur in Sessions Trial No 419 of 1989 by which appellant Nagina Rai has been convicted, apart from other, under Section 302 of Indian Penal Code (IPC) and sentenced to imprisonment for life. The rest, apart from other sections in respect of different appellants, have all been convicted under Sections 149/302 of IPC and sentenced to undergo rigorous imprisonment for seven years only. The sentences are to run concurrently.

2 The first thing we would like to notice is how the trial Court of the Additional Sessions Judge V could at all sentence the appellants to only seven years rigorous imprisonment having found them guilty of offence punishable under Sections 149/302 of



IPC. In our view, the law gives little discretion to the Sessions Court in this regard. The punishment could either have been death or imprisonment for life. There is no third punishment possible. From the ordersheet of these appeals, it appears this fact was noticed at the very stage of admission in the year, 1992 itself and appellants were put to notice with regard to enhancement of sentence in case their convictions were upheld but surprisingly little appears from the records as to what happened to the learned Additional Sessions Judge V who had proceeded in such an uneducated manner. We say no more.

3 We may also notice that when these matters were taken up after 22 years of filing, it was pointed out by learned counsels that appellant Kapildeo Rai had died sometime in the year, 1996 itself as per noting available in the counsel's file but as the clients were not in touch, no affidavit could be filed. We have no reason to disbelieve this because at the time when judgment of conviction and order of sentence were passed in the year 1992, he was 50 years old. Upon that calculation, he would be not less than 70 years now. We may also note that at that time itself, appellant Paltoo Rai was 70 years old. Appellant Ram Khelawan Rai was about 75 years old. Appellant Shital Rai was 70 years old. Appellant Ganni Rai was 65 years old and appellant Jitan Rai was 62 years old. If they

are alive they all would be about 80 years or 90 years old as the case may be. In all probabilities, these six appellants would not be alive today. We need not labour on this except noticing this fact in view of the order that we ultimately intend to pass.

4 Learned counsels for the appellants submit that the conviction and the sentence are not sustainable either on fact or in law. The reason is simple. In a criminal trial, prosecution is required to come up with a concrete case or a singular case and prove it beyond reasonable doubt. The duty of the defence is not to prove their innocence but only to create doubts in the prosecution case, if not to show its falsity. In the present case, the learned counsels for the appellants would submit that there is no singular case being pursued by the prosecution. The facts of the case change materially with time. The Fardbayan, which is the earliest recording of the event, gives one version. The prosecution witnesses in Court give another version. The informant (PW 10A), when he comes before the Court, resiles from his Fardbayan and gives a third version. The Investigating Officer (IO) discloses a fourth version. Learned counsels submit that this in itself is sufficient to create bag full of doubts and it cannot be held that the prosecution has succeeded in proving its case beyond reasonable doubt rather prosecution has created more than one case and created more doubts than resolved them and the benefit must go

to the appellants.

5 Having considered the evidence and perused the records and having heard the parties, we intend to accept the submission that the appeals have to be allowed and the conviction and sentences have to be set aside for the reasons hereinafter noted.

6 The prosecution case is based upon a Fardbayan of Sukhdeo Rai (PW 10A), the father of the deceased Sakaldeo Rai as recorded by Shatrudhan Singh (PW 11), the Officer-in-charge of Raghapur Police Station Station (PS), District – Vaishali, as recorded by him a about 7.45 pm allegedly in the Village - Bahrapur, PS – Raghapur, District – Vaishali. It is alleged in the Fardbayan that at about 12 noon on 29.11.1986 when Sakaldeo Rai, the deceased being son of the informant (PW 10A) was attending to his pump in the agricultural field then one Gauri Rai, from whom he had purchased some lands, came and asked him to accompany him to get the lands measured and demarcated. Sakaldeo Rai refused. Upon this, Gauri Rai ordered and appellant Nagina Rai fired hitting Sakaldeo Rai who dropped dead. The informant (PW 10A) was on the door of his house at about 20 laggis away (one laggi about six and half feet). He had heard and seen the incident. There was Raghubir Rai (PW 10) and Mishri Rai (PW 5) also in the nearby area who had seen the incident. This Fardbayan was witnessed by Sanjay Kumar (PW 7), the son of

the deceased who later, in the trial, claims to have seen the occurrence as well.

7 Upon this Fardbayan being recorded as aforesaid, it was sent and registered as a first information report (FIR) giving rise to Raghapur PS Case No 79 of 1986 at about 11.45 pm on 29.11.1986 itself. From records, it appears it was sent to the Court on the next morning that is 30.11.1986 but it has been put up before the Subdivisional Judicial Magistrate, Vaishali only on 01.12.1986.

8 All the fourteen appellants including Gauri Rai are named accused. Inquest is prepared at about 8 pm and the body is sent for post mortem. It is not in dispute that before this case could be registered, there was yet another case registered as a counter case being Raghapur PS Case No 78 of 1986. That case was lodged by the informant therein Nagina Rai alleging that while Sakaldeo Rai was attending to his pump, Gauri Rai had come there with others. He was having a dispute with one Juge Rai in the afternoon. Kapildeo Rai and Sakaldeo Rai were measuring the land when Gauri Rai came there and objected. There was altercation between Gauri Rai and Juge Rai. Gauri Rai fired from his rifle at Juge Rai. This case was also investigated by the same IO and chargesheet was filed. It may be interesting to note that both the trial arising out of Raghapur PS Cases No 78 and 79 of 1986 were tried by the same Court advisedly. First

thing to be noted is that there are two versions of the incident. In both the cases, chargesheet was filed after investigation. The first thing to be noticed is in one case with which we are concerned, it is alleged that Nagina Rai shot and killed Sakaldeo Rai at the instance of Gauri Rai. In the second case, Nagina Rai alleges that Gauri Rai fired from his rifle killing Juge Rai. In the present case, when the informant (PW 10A) of the present case is cross-examined and when the IO Shatrudhan Singh (PW 11) is cross-examined, both of them accept that in fact the IO (PW 11) recovered two dead bodies which were originally lying together at the place of occurrence. In neither of the two cases, this fact is even mentioned obliquely in the Fardbayan nor the prosecution even attempts to explain these two deaths at the place of occurrence. In the present case arising out of Raghapur PS Case No 79 of 1986, prosecution totally gives a go by to the murder of Juge Rai whereas in the case arising from Raghapur PS Case No 78 of 1986, the prosecution gives a total go by to the death of Sakaldeo Rai. In our view, this itself is sufficient to show that the manner of occurrence, as projected by the prosecution, is highly doubtful but Shri Ajay Mishra, learned Additional Public Prosecutor would submit that prosecution has come up with a singular accusation that it is Nagina Rai in the present case who has shot Sakaldeo Rai and we must examine only that case. Unfortunately that is not the role of the



Court. The Court has to see the case as a whole. Seeing as a whole, the situation is not as simple as alleged by the prosecution for both the informant (PW 10A) and the IO (PW 11) admit that in the same transaction, Juge Rai was also shot dead but there is no evidence being brought by the prosecution in this regard nor anyone is chargesheeted with that offence. What we find curious is that though in the Fardbayan itself, the informant (PW 10A) alleges that upon orders of Gauri Rai, Nagina Rai fired at Sakaldeo Rai killing him. Gauri Rai is not even chargesheeted much less charged, much less convicted or punished whereas in the second case where the allegation is that Gauri Rai fired killing Juge Rai, Gauri Rai was charged with the murder of Juge Rai at the same place and for the same incident. There is no explanation forthcoming from the prosecution for this vital discrepancy. We have to keep this in mind when we ultimately have to decide whether the appellants have rightly been found guilty or not.

9 We come to the evidence. First three witnesses are examined that is Bhuletan Rai, Bindeshwar Rai and Ram Brichh Rai being PWs 1, 2 and 3 respectively. All three become hostile. They do not know anything about the incident. We then have PW 4 Lal Babu Chaudhary who is an Advocate Clerk and is a formal witness proving the Fardbayan. Similarly, PW 6 Narendra Narayan Chaudhary is a

formal witness who is also an Advocate Clerk and he proves the formal FIR. We then have PW 8 Lal Babu Chaudhary who is again an Advocate Clerk and is a formal witness who proves the post mortem report. Thus, out of the total 12 witnesses examined, six prove to be useless for any purpose. We are left with six because the informant (PW 10A) has been designated as witness.

10 At this stage itself, we may now note one other fact. As from the Fardbayan, it would appear that the informant Sukhdeo Rai (PW 10A) alleged that it was Gauri Rai who ordered and Nagina Rai fired but Gauri Rai was not even chargesheeted much less charged in this trial. This question was put to the informant (PW 10A) in his cross-examination. He feigned ignorance though he admitted that the Fardbayan was duly recorded as narrated by him and was correct. This clearly shows the change of the prosecution stand as between the Fardbayan and the trial. Gauri Rai had to be left though the genesis was Gauri Rai himself. The informant (PW 10A) was then further questioned that Juge Rai was also found shot dead at the place of occurrence. He feigned ignorance but then admitted this fact. In fact, he categorically admitted that both the bodies were originally lying at the same place till the body of Juge Rai was then carried to the land of Kapildeo Rai and recovered by the police from the Katchery of Kapildeo Rai. As to why, there is not a whisper of

this death in this prosecution case, there is no explanation. We next come to the evidence of the IO (PW 11) Shatrudhan Singh. He is the person who recorded the Fardbayan in the present case, investigated both the cases, filed chargesheets in both the cases, appeared as a witness in both the cases but did not disclose one fact of one case in the other. He was questioned about two deaths. He admitted that there were two deaths. The post mortem of Juge Rai is Exhibit A produced by the defence. The second case was that Gauri Rai in fact had shot and had intended to kill Juge Rai but in the transaction, Sakaldeo Rai also accidentally got killed. The IO (PW 11) admits having investigated the case as well and chargesheeted Gauri Rai but for the murder of only Juge Rai and the prosecution did not bring up the case of murder of Sakaldeo Rai in the second case and that is the ground of acquittal of all in the second case. If that be so, we do not think that when there was another person shot dead at the same place but the prosecution does not explain how and when. We cannot uphold the conviction because the whole genesis and the manner of occurrence become highly doubtful.

11 We may also note here that the IO (PW 11) makes some important admissions. The first thing to be noted that the incident took place at about 12 noon on 29.11.1986. There is no evidence that any one made an attempt to go and inform the police.



Two persons had been shot dead. The evidence remains uncontroverted that the IO (PW 11) came on hearing the rumours on his own. The incident had taken place at 12 noon, as noticed above but the Fardbayan was recorded only at 7.45 pm. In between, the IO admits that the body of Sakaldeo Rai had been removed from the place of occurrence and was intended to be taken to Patna for treatment. We wonder why? He was already dead. The bullet passed through his chest through and through. The body was then brought back and placed at the place of occurrence. No one informed the police but everyone waited for the police. The body of Juge Rai, which is not a subject matter of the present appeal, was moved from the place of occurrence to the land of Kapildeo Rai adjacent and then to the Katchery of Kapildeo Rai from where it was seized by the police. These facts, which had occurred before the Fardbayan was recorded, were not even mentioned in the Fardbayan. Then we come to the evidence of Mishri Rai (PW 5). He admits that he himself went up to the police and gave a statement two days after the occurrence. His name is mentioned in the Fardbayan. He spins a third story. According to him, appellant Nagina Rai shot Sakaldeo Rai and Nanda Rai shot Juge Rai. We failed to understand if this is the evidence why was not Nanda Rai charged in the trial for murder of Juge Rai.

12 Thus seen, there are completely three different

versions of the incident relating to two deaths, one of which not even acknowledged in the trial.

13 In our view, these are sufficient contradictions to allow the appeals and set aside the judgment of conviction and order of sentence. We, accordingly, do this. The judgment of conviction and order of sentence under appeal are set aside. The appellants are set at liberty.

(Navaniti Prasad Singh, J)

**Patna High Court,
The 22nd of January 2015,
AF R, M E Haque/-**

(Anjana Mishra, J)

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