

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.320 of 1992

Arising Out of PS.Case No. -26(6) Year- 1978 Thana -SANDESH District- BHOJPUR

Chhotay Lal Doam, son of Dular Doam, resident of Village Kalyanpur, P.S. Udwant Nagar, District Bhojpur

.... Appellant

Versus

The State of Bihar

.... Respondent

With

Criminal Appeal (DB) No. 340 of 1992

Arising Out of PS.Case No. -26(6) Year- 1978 Thana -SANDESH District- BHOJPUR

- 1. Jhalku Dom, son of Fazil Dom, resident of Village Akhgaon Sandesh at present Derhgaon, P.S. Piro, District Bhojpur
- 2. Julan Dom, son of Bachan Dom, resident of Village Aayar, P.S. Jagdishpur, District Bhojpur

.... Appellants

Versus

The State of Bihar

.... Respondent

Appearance :

- For the Appellants : Mr. A.K. Srivastava, Advocate
Mr. Anil Kr. Mishra, Advocate
- For the State : Mr. A.K. Sinha, APP
Mr. Ajay Mishra, APP

CORAM: HONOURABLE MR. JUSTICE V.N. SINHA
and

HONOURABLE MR. JUSTICE JITENDRA MOHAN SHARMA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE V.N. SINHA)

Date: 07-08-2015

Heard learned counsel for the appellants and the State.

2. These two appeals are directed against the judgment/ order dated 28.07.1992, passed by 2nd Additional Sessions Judge, Arrah, in Sessions Trial No. 99 of 1979

whereunder the three appellants in the two appeals have been convicted for the offences under Section 302/34 of the Penal Code, Section 27 of the Arms Act and directed to suffer rigorous imprisonment for life, seven years respectively under the two counts. The sentences, however, have been directed to run concurrently.

3. Prosecution case, as set out in the First Information Report of informant Jaimurti Domin, wife of deceased Fatingan Dom, recorded by A.S.I. Balwant Singh of Sandesh Police Station on 29.06.1978 at 8.00 A.M., is that informant after taking dinner last night was sleeping in the courtyard along with her daughter-in-law, grand-children, her husband Fatingan Dom was sleeping outside the house in the *sahan*. Informant woke up around 12.00 in the mid night hearing gun shot came out from the courtyard in the *sahan*, saw Babban Dom, Chotelal Dom, Jhalku Dom, Julum Dom all armed with gun and her husband injured with gun shot. Having seen her husband injured she began to weep raising alarm and loudly claiming as to why the four killed her husband. Babban Dom asked her to keep quiet otherwise she will be killed along with her grand-children. Babban Dom also fired on her husband in her presence. The other three resorted to firing on the grand-son, daughter of the informant inflicting injury on their



person. Her husband died at the spot. In the meantime, her neighbour Chaturi Paswan (P.W. 3) and others arrived, saw the assailants making good their escape. In the fardbeyan informant further stated that 10 days earlier Jhalku Dom asked her husband to leave the village, otherwise he will be killed. It is further stated that there is land dispute between her husband and the accused persons.

4. On the basis of the fardbeyan formal First Information Report was drawn on 29.06.1978, dispatched to the court on the same day through special messenger but was received in court on 30.06.1978 though there is endorsement over the First Information Report indicating its perusal by the Chief Judicial Magistrate on 03.06.1978. From the order-sheet of Chief Judicial Magistrate it, however, appears that First Information Report was received on 30.06.1978. A.S.I. having registered the First Information Report proceeded to the village of the informant to conduct investigation of the case. From the record it, however, does not appear that any inquest proceeding on the dead body of the deceased was conducted as no inquest report is available on the record. From the case diary it, however, appears that the post mortem on the dead body of Fatingan Dom was performed on 30.06.1978 by Dr. Vidyadhar Prasad, Medical Officer, Sadar Hospital, Ara, who found pellet injuries on his person and certified



that the death of Fatingan Dom took place 30 ours earlier. A.S.I. recorded the further statement of the informant, police statement of the witnesses and on the basis of the materials collected during investigation submitted charge-sheet. In the light of the charge-sheet cognizance was taken, summons were issued to the accused persons and after their appearance, supply of police papers case was committed to the Court of Sessions. Sessions Court framed charge against the four accused persons named in the First Information Report under order dated 11.04.1981 to which accused persons pleaded not guilty and claimed to be tried.

5. In support of the charge prosecution examined as many as six witnesses. P.W. 1 Ram Pratap Thakur is a Police Havildar who carried the dead body of Fatingan Dom to Ara Sadar Hospital. P.W. 2 Rajmahal Singh is a formal witness, who proved the endorsement made on the First Information Report. P.W. 3 Chaturi Paswan is neighbour of the informant, named in the First Information Report as the one who came to the place of occurrence on alarm raised by the informant. P.W. 4 Subedar Dom is also named witness in the First Information Report but appears to be a hearsay witness. P.W. 5 Ram Chabbid Ram is Chowkidar of the village. P.W. 6 Murat Ram is the Clerk in the office of Public Prosecutor.

6. Learned counsel for the appellants submitted that the finding of guilt recorded by the court below does not merit affirmance by this Court as the trial court while convicting the appellants failed to appreciate that neither the inquest nor the post mortem report of the deceased is on record, as such, the claim of the prosecution that Fatingan Dom died in the occurrence, which was perpetuated by the appellants and one Babban Dom, who absconded during trial, does not appear to have been established. Learned counsel further submitted that from the evidence of the prosecution witnesses, it will appear that the informant was the only eye-witness who saw four accused persons armed with gun standing in her *sahan* and her husband fallen down after sustaining fire-arm injury but she having not been examined, may be on account of death, there is no evidence either on record to establish the prosecution story that these appellants committed the occurrence. In this connection, learned counsel also referred to the evidence of F.I.R. witness Chaturi Paswan (P.W. 3) and submitted with reference to his evidence in Paragraphs 4, 8 that when P.W. 3 reached the place of occurrence by that time accused persons had made good their escape. Counsel for the appellants submitted that Subedar Dom (P.W. 4), though named in the First Information Report, but from perusal of his evidence, it will appear that he



learnt about the occurrence from the informant, as such, his testimony cannot be relied upon to maintain the conviction of the appellants.

7. Counsel for the State, on the other hand, supported the findings recorded by the trial court but accepted that neither the inquest nor the post mortem report of the deceased is on record and the quotation from the post mortem, recorded in paragraph 27 of the case diary, cannot be admitted in evidence for failure of the prosecution to either bring on record the original post mortem report or to examine Dr. Vidyadhar Prasad, who conducted autopsy on the person of Fatingan Dom. State counsel further conceded that neither informant nor the injured nor the Investigating Officer of the case has been examined but explained non-examination of the informant by saying that she died during trial.

8. Having heard counsel for the parties, we are of the view that the First Information Report was registered on 29.06.1978 at 8.00 A.M. whereafter the same appears to have been dispatched to the court on the same day through special messenger but the First Information Report was received in the court of Chief Judicial Magistrate on 30.06.1978 and there is no explanation for such delay, which is indicative of the fact that perhaps the contents



of the First Information Report indicating the name of the accused persons and the manner of occurrence is not correctly recorded therein. In this connection, we would like to mention that A.S.I., who having registered the First Information Report proceeded to the village of the informant to conduct investigation and then sent the dead body for post mortem but neither the inquest report nor the post mortem report is available on record, as is evident from the evidence of P.W. 6, the two documents with the original case diary was handed over to Sri Shiv Pujan Sahay, learned APP, who while conducting the trial left for heavenly abode and the original records of the case i.e. inquest, post mortem report remained in the office of Sri Sahay and could not be brought on record. Nonetheless, the fact remains that neither the inquest report nor the post mortem report is available on the record, as such, it may not be possible for us to conclusively hold that Fatingan Dom suffered death by culpable homicide. Informant, the two injured having not been examined there is not even an iota of ocular evidence on record to suggest that accused persons were the assailants of the deceased and inflicted injuries on the person of Fatingan Dom. Evidence of Chaturi Paswan (P.W. 3) that he saw Fatingan Dom dead lying in his *sahan* with fire-arm injury is only indicative of his homicidal death and not the involvement of the accused persons in the crime.

In the circumstances, the three appellants are entitled for grant of benefit of doubt. The two appeals are allowed. The judgment of conviction and order of sentence is set aside. The three appellants are discharged of the liability of their respective bail bonds.

(V.N. Sinha, J)

(Jitendra Mohan Sharma, J)

Rajesh/N.A.F.R.

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