

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.225 of 1992

Arising Out of P.S.Case No. 76 Year- 1983 Thana -Kanti District- MUZAFFARPUR

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1. Parichhan Bhagat @ Raam Parichhan Bhagat son of Sunder Bhagat
 2. Rajendra Bhagat son of Late Kailash Bhagat
 3. Bhola Dusadh @ Bhola Paswan son of late Jokhan Bhagat
 4. Chulahi Bhagat son of late Makhan Bhagat
 5. Jamun Bhagat son of Gopi Bhagat
 6. Ram Ashish Bhagat @ Ramashish Bhagat son of Sunder Bhagat
 7. Satya Narain son of Ram Ashish Bhagat.

.... Appellants

Versus

The State of Bihar

.... Respondents

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Appearance :

For the Appellants : Shri Yogendra Prasad Sinha, Advocate
Shir Arun Kumar, Advocate
Smt. Alka Verma, Advocate
For the State : Shri Abhimanyu Sharma, APP

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CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA
and
HONOURABLE SHRI JUSTICE GOPAL PRASAD

ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)

Date: 04-08-2015

The seven appellants, after being indicted of committing the offence under Section 302/149 of the Indian Penal Code by the learned 4th Additional Sessions Judge, Muzaffarpur were put on trial in Sessions Trial No.27 of 1984. By judgment of conviction and order of sentence dated 30th of June, 1992 they were held guilty of committing the offence they had been charged with and each of them was directed to suffer rigorous imprisonment for life. The appellants, being aggrieved by and dissatisfied with the judgment of conviction and order of sentence, have preferred the present appeal to set up a

challenge to the correctness of finding of guilt and appropriateness of the order of sentence.

2. The deceased Gurudayal Sahani stated in his fardbeyan (Ext-1) that after taking his meal and coming back from his house, he stopped at the *Darwaza* of P.W.9 Kishori Singh where other persons besides Kishori Singh (P.W.9) Umashanker Singh, son of Kishori Singh (P.W.9), Fakira Paswan examined as P.W.4 and Rooplal Sahani (not examined) were also sitting there from before. The deceased Gurudayal Sahani sat down and started talking with persons present there when appellant Parichhan Bhagat @ Ram Parichhan Bhagat is said to have started abusing him from his own *Darawaza*. P.W.9 Kishori Singh is said to have stated to appellant Parichhan Bhagat @ Ram Parichhan Bhagat that he should keep quite as the issue was to be resolved on some other day. The deceased Gurudayal Sahani stated that he sat quietly there, but just in a little while the eight accused persons named in the FIR which included the seven appellants arrived at the *Darwaza* of P.W.9 Kishori Singh armed with *lathi*, *farsa* and *bhala* and started giving blows to the deceased Gurudayal Sahani with their respective weapons. The deceased Gurudayal Sahani ran towards north into the field adjoining the *Sahan* land of the Darwaza of P.W.9 Kishori Singh, but he was surrounded by the accused persons and was beaten up so much so as

to be presumed to be dead, when the accused persons retreated from the scene of occurrence.

3. The deceased Gurudayal Sahani stated that appellants Parichhan Bhagat @ Ram Parichhan Bhagat, Chulhai Bhagat and Bhola Dusadh @ Bhola Paswan were carrying *farsa* while appellant Rajendra Bhagat and accused Kailash Bhagat (died during trial) were armed with *bhalas* and appellant Satya Narain Bhagat was having a *lathi* in his hand. However, the deceased Gurudayal Sahani could not state as to what was the weapon appellant Jamun Bhagat was carrying with him.

4. The deceased Gurudayal Sahani stated that he was assaulted on account of previous enmity existing between him and the accused persons and further, that the accused persons had been identified by him in the light of a lantern which was kept hanging there as also in the flash of the torch lights which were in the hands of the accused persons.

5. P.W.5 S.I. Jyoti Narayan Singh would depose that he had received an out door patient slip from State Dispensary, Kanti on 03.04.1983 at about 10 P.M. and he entered the information into Station Diary Entry No.53 dated 03.04.1983 and himself came to State Dispensary, Kanti with Probationary Deputy Superintendent of Police, Arbind Kumar and ASI Lakshman Singh. He found the



deceased Gurudayal Sahani lying on the bed in the hospital and he recorded the fardbeyan (Ext-1) of deceased Gurudayal Sahani in presence of P.W.8 Baidnath Sahani and P.W.6 Mohan Sahani. He, thereafter, sent the copy of the report to the police station for the drawl of the FIR and this is how Ext-3 the FIR of the case was drawn up on the basis of the forwarding note Ext-2 recorded by P.W.5. P.W.5 Jyoti Narayan Singh would state that the condition of deceased Gurudayal Sahani was very critical and, as such, he sent a requisition to the Block Development Officer, Kanti for recording the dying declaration of deceased Gurudayal Sahani. The requisition addressed to the BDO, Kanti stood marked Ext-4. The BDO did not turn up and, as such, he requested P.W.10 Dr. Bhupendra Narain Singh, the Medical Officer, I/C Kanti Primary Health Centre to record the dying declaration of deceased Gurudayal Sahani and it was how Ext-10 the dying declaration of deceased Gurudayal Sahani was recorded by P.W.10 Bhupendra Narain Singh.

6. P.W.10 Bhupendra Narain Singh has also stated that he had, on the receipt of the requisition from P.W.5 had recorded the dying declaration Ext-10 of deceased Gurudayal Sahani in presence of at least three witnesses.

7. P.W.5 Jyoti Narayan Singh stated further that the deceased Gurudayal Sahani died just after giving his dying

declaration and, accordingly, he held inquest upon his dead body at about 11.40 P.M. on 03.04.1983. The inquest report has been marked Ext-6. P.W.5, thereafter prepared the dead body Challan and dispatched the dead body to Shri Krishna Medical College & Hospital, Muzaffarpur for holding postmortem examination which was indeed held by Dr. Manoranjan Kumar Srivastava (P.W.7).

8. P.W.5 had inspected the place of occurrence and noted down its description in the case diary. According to P.W.5, it was the onion field of P.W.9 Kishori Singh which was situated at the end of the Sahan and the total area of the *Darwaza* and *Sahan* was about five *kathas*. P.W.5 found prominent trampling marks in the onion field and also found blood fallen there which was seized by preparing seizure memo Ext-7. He recorded the statements of witnesses and conducted search in the houses of accused persons to recover blood stained *lathi*, *bhala* and *farsa* and had prepared seizure memos for the recovery of those articles from three different houses of three different accused persons. P.W.5 obtained the copy of the postmortem examination report as also the dying declaration and finding materials sufficient forwarded eight accused persons named in the FIR for their trial.

9. The defence of the appellants was that their innocence and false implication. It was suggested that they had been

implicated on account of the admitted enmity between the parties.

10. Eleven witnesses were examined by the prosecution P.W.8. Baidnath Sahani, a witness to the recording of the fardbeyan, was cross-examined by the prosecution without being declared hostile. Out of the remaining witnesses, P.W.1 Bhutta Paswan, P.W.2 Ram Swaroop Sahani, P.W.3 Kapildeo Sahani, P.W.4 Fakira Paswan and P.W.9 Kishori Singh had supported the prosecution case as eye witnesses. P.W.5, we have already noted was S.I. Jyoti Narayan Singh who had investigated the case. P.W.6 Mohan Sahani was yet another witness to the recording of the fardbeyan by P.W.5. We have just pointed out that P.W.7 Dr. Manoranjan Kumar Srivastava had conducted autopsy on the dead body of deceased Gurudayal Sahani. P.W.11 Rijhan Sahani testified to the fact that Ext-10 the dying declaration of deceased Gurudayal Sahani was recorded in his presence by P.W.10 Dr. Bhupendra Narayan Singh.

11. After taking us through the evidence of witnesses, Shri Yogendra Prasad Sinha, the learned counsel appearing on behalf of the appellants submitted that no specific allegation was made as regards giving any particular blow to the deceased Gurudayal Sahani and this fact was correctly found by the learned trial Judge. As such, it is very difficult to say that the appellants were acting in prosecution of the common object of the unlawful assembly. Submission also was



that the place of occurrence had not been established and further, two witnesses, i.e., P.W.2 Ram Swaroop Sahani and P.W.3 Kapildeo Sahani were not named in the FIR though four such persons had been named by the deceased Gurudayal Sahani who were allegedly sitting prior to his arrival at the *Darwaza* of P.W.9 Kishori Singh. Submission was that the two witnesses, i.e., P.W.2 Ram Swaroop Sahani and P.W.3 Kapildeo Sahani are subsequent addition to the array of witnesses in order to augmenting the prosecution charge because those named in the FIR, like, Umashankar Singh and Roop Lal Singh had not turned up to support the prosecution case. It was next contended that the court must reject the evidence of P.W.2 Ram Swaroop Sahani and P.W.3 Kapildeo Sahani. As regards the evidence of P.W.4, submission was that out of eight persons named in the FIR he had claimed identifying only five and that particular statement of P.W.5 puts into doubt the claim of the prosecution that there was any source of light present there. It was contended that the cross-examination of witnesses indicated as if they had equally been inimical towards the accused persons. In so far as the acceptance of the dying declaration (Ext-10) is concerned, submission was that the very admission by P.W.5, the investigating officer and other circumstances attending thereto makes it utterly unsafe to place reliance upon the dying declaration (Ext-10) so as to seeking

sustenance to the judgment of conviction and order of sentence.

12. Shri Abhimanyu Sharma, the learned Additional Public Prosecutor has contested the submissions tooth and nail. Submission was that consistency was the hallmark of truthfulness the evidence of witnesses and it was not desirable under law that P.Ws.2 and 3, i.e., Ram Swaroop Sahani and Kapildeo Sahani ought to have been named in the FIR in order to be acceptable eye witnesses. Submission was that the accused persons were the very co-villagers of the informant and there was no difficulty even in absence of any source of light for Gurudayal Sahani to appropriately identify them.

13. There is no dispute that deceased Gurudayal Sahani was assaulted as brutally as to be murdered. The evidence of P.W.7 Dr. Manoranjan Kumar Srivastava could be enough testimony to the above opinion of ours when after holding postmortem examination on the dead body of deceased Gurudayal Sahani, he recorded the following ante-mortem injuries on his dead body:-

- (i) Stitched wound 3" long on the middle of the skull. Stitches were opened and on further dissection fracture of frontal bone of skull and sub-dural hematoma were found behind the fracture in an area of $\frac{1}{2}$ "x $\frac{1}{2}$ ".
- (ii) Penetrating wound 1"x $\frac{1}{2}$ " x abdominal cavity deep found on the right hypo condrium of the abdomen with blood clot.
- (iii) Stitched wound 8" long on left sole. The wound was dissected and was found up to muscle deep.

(iv) Incised wound 2" x ½" x muscle deep on the back of left knee joint with the blood clots.

(v) Bruise 2" x ½" found on the left scapular region.

(vi) Bruise 3" x ½" found on the fifth lumbar vertebra

P.W.7 had found smell of alcohol and, as such, he had preserved some part of the viscera but it does not appear the viscera preserved by P.W.7 was sent for chemical examination.

In the opinion of P.W.7, the death had occurred on account of injuries no.1 and 2 which were sufficient in the ordinary course of cause to cause death of the deceased.

14. However, there still some remain questions which are required to be answered and they appear to us relating to the competence of P.Ws.2 and 3 being eye witnesses to the occurrence. We do not have any quarrel with the submission of Shri Sharma, the learned APP that it was not at all necessary to name someone in the fardbeyan as a witness, but if some one has been named, then one expects that persons, like, P.Ws.2 and 3 ought to have been named by his father (deceased) in addition to four others named in his statement who had been sitting there or who had been present there before the deceased arrived after taking his meal. P.Ws.1 and 2 were the sons of the deceased Gurudayal Sahani and as appears from the evidence of other witnesses, P.W.3 Kapildeo Sahani had arrived prior to the



arrival of the deceased himself and he was very well sitting at the time when the deceased Gurudayal Sahani had come to the Darwaza of P.W.9 Kishori Singh. Some of the witnesses point out that it was after quite some minutes that the deceased Gurudayal Sahani had come at the *Darwaza* of P.W.9 Kishori Singh and had participated in the conversation which was going on there among persons who were already sitting there. P.Ws.2 and 3 were non-else, as we have already noted, that the sons of the deceased and if they were already there it could be an usual expectation of any ordinary person to expect that the deceased Gurudayal Sahani ought to have mentioned their names in his fardbeyan. The absence of the names of two witnesses in that document, to us appear substantial omission on the part of the deceased Gurudayal Sahani who was naming P.W.9 Kishori Singh, his son Uma Shanker Singh (not examined), P.W.4 Fakira Paswan and one Rooplal (not examined) as persons who were already sitting there prior to his arrival there and with whom he also started conversing. P.W.3 had claimed that he had gone to purchase some medicine and had come back from the medicine shop. As regards P.W.2 Ram Swaroop Sahani, he stated that he was at his *Bathan* and after hearing *Hulla*, he rushed to the place of occurrence and found that the *Hulla* was emanating from the *Darwaza* of P.W.9 and also found Kailash accused pointing out to his companions that it was deceased



Gurudayal Sahani who was required to be killed and thereafter other accused persons with *farsa*, *bhala* and *lathi* came to the Darwaja of P.W.9 seeing whom the deceased ran towards north into the pea- field of P.W.9. He was however surrounded by the accused persons who gave blows to the accused persons with their respective weapons to cause the injuries. The corss-examination part of P.W.1 indicates as if other persons who were cited as a witness by the informant/deceased had arrived subsequent to his arrival. Not only that in paragraph-6 of his cross-examination P.W.1 had stated that it was about 20 *laggas* or so a distance which was intervening the *Darwaza* of P.W.9 Kishori Singh and his own cattle shed where he was present there.

We have certain reservations about the competence of P.W.2 as he was very well specifying some place by stating that it was appellant Jamun Bhagat who had given a *lathi* blow on the neck of the deceased. No witness has stated about any specific blow given by any particular accused to the deceased and we see reason for P.W.2 to make the above statement for the reason that he was more motivated by the enmity which was existing between his family and that of the accused persons that he was attempting to ensure his acceptance as a witness who could only be telling the truth.

15. So far as the evidence of P.W.1 Bhutta Paswan is concerned, he was not named in the FIR, but still he had given an eye



witness account to the prosecution story by stating that he had also come running from his house after hearing some *Hulla* and found that the deceased Gurudayal Sahani was being assaulted with *lathi* and *bhala* by the accused persons and thereafter they made good their escape. The deceased Gurudayal Sahani was thereafter shifted to the hospital. The witness also claimed identifying the accused persons in the light of torch flashed by the accused as also in the lantern which was kept there. P.W.1 Bhutta Paswan appears a partisan witness as he had deposed as witness against the accused persons in different proceedings as appears stated by him in paragraphs-10 and 11. So far as the evidence of P.W.4 Fakira Paswan is concerned, we have found him, in spite of being a co-villager, he could not identify all the accused persons and named only five, during his deposition as persons who were identified by him and who had come there to assault the deceased. Out of these five Kailash had already died during the trial and what further appears from the evidence of P.W.4 was that his evidence probably puts the other questions which was substantially raised before us, i.e., sufficiency of the source of identification. If the light was as good as to facilitate identification either by the deceased Gurudayal Sahani or by any of the witnesses, then we do not see any reason as to why P.W.4 Fakira Paswan ought not have named all accused persons after identifying them. He had named only five. It



was true that the accused persons were the co-villagers of the deceased and the witnesses even if accepting that there was a lantern kept burning there at the *Darwaza* of the deceased Gurudayal Sahani, what we find further is that the real part of the occurrence had not taken place at the *Darwaza* rather it was a place which was away from the *Darwaza* at the north eastern end of it into an onion field that the deceased Gurudayal Sahani had been surrounded and had been beaten up. The place which was away from the *Darwaza* must not have been as lighted as to facilitate clear identification by witnesses. This appears the reason that P.W.4 Fakira Paswan had not named the eight accused persons who were cited as accused in the statement of deceased Gurudayal Sahani and that clearly points out to us that the light was not as sufficient as was claimed by the witnesses and that situation becomes more compounded by the fact that the lantern admittedly was never produced before P.W.5 Jyoti Narayan Singh nor the same was seized by him as per the evidence of witnesses including the I.O. It has been stated by the witnesses that the two torches were being carried by the accused persons and it was further stated by them that one of them was flashing the torch and at the same time was giving the blows. We are not on the improbable aspect of the evidence but we find that the situation does not appear acceptable as in the process of chasing and surrounding the accused, if some one was

flashing a torch, we do not suppose him to giving the blows also.

16. The most important aspect of the prosecution case was that the manner in which Ext-10, dying declaration of the deceased Gurudayal Sahani was brought into existence. P.W.5 stated in his evidence that he had sent a requisition to the Block Development Officer, Kanti requesting him to come down to the hospital for recording the dying declaration of deceased Gurudayal Sahani, but he did not turn up as a result of which he was forced to request P.W.10 Dr. Bhupendra Narain Singh who came and recorded the dying declaration. We had the dying declaration in its original on the lower court records and we find that neither P.W.10 himself gave a certificate for satisfying the judicial enquiry that indeed deceased Gurudayal Sahani was in a fit state of mind to give the statement nor did he himself appended a certificate even at the end of recording the statement that he had found deceased Gurudayal Sahani mentally fit to make statement and, as such, he had recorded the statement. P.W.11 Rijhan Sahani had stated that while giving the statement deceased Gurudayal Sahani was neither bearing any bandage nor any sign of having been given any medical care and his voice was very feeble and some times he used to stop while giving the statement. P.W.2 Ram Swaroop Sahani, the son of the deceased who had claimed accompanying his father, stated that his father was



unconscious but was still speaking. P.W.10 Bhupendra Narain Singh who recorded the dying declaration, kept the recorded statement with him for four days and thereafter forwarded the same to the SDJM (West), Muzaffarpur as against that P.W.5 stated that he himself obtained the copy of the dying declaration. P.W.5, the investigating officer, admitted that after 40 minutes of recording the fardbeyan of deceased, Gurudayal Sahani had died and it is not disputed that the dying declaration was recorded much after the recording of the fardbeyan. P.W.10 was put a question as when did he record the dying declaration and he stated that he had recorded it at 11 P.M. But subsequently hastened to add that he cannot say the time as that part of the record (Ext-10) was torn. We find that indeed the record was made at 11 P.M. as appears mentioned in the very record itself. If deceased Gurudayal Sahani had died after 40 minutes of recording the fardbeyan which was recorded at 10.35 P.M., then it could safely be said that he died at about 11.15 P.M. It was such a short time between the recording of the dying declaration of deceased Gurudayal Sahani and his death that it makes unsafe to hold with certainty that deceased Gurudayal Sahani could have been in a fit state of mind to make the statement which recorded by P.W.10. We have serious doubt about the genuineness of the dying declaration and, as such, we have chosen to exclude the document from being used as evidence.



17. We have already referred to the evidence of P.W.2 Ram Swaroop Sahani who stated that his father was unconscious but was still speaking. It was such a statement which was presenting two conflicting situations of either the deceased Gurudayal Sahani could be unconscious or he could be speaking very well. We do not have any evidence of the doctor who had attended on him as to what was the condition of deceased Gurudayal Sahani when he was making the statement Ext-1, the fardbeyan. We have doubt that the injuries which were received by him and the seriousness specially of injury nos.1 and 2 could not have made it possible for the deceased Gurudayal Sahani to be in a position to make the statement.

18. The above view of ours appears fortified by another circumstance appearing from the record that the FIR was lodged on 03.04.1983 at 11.05 P.M. and it was to be transmitted by Kanti police station to reach the Civil Courts at Muzaffarpur, As appears from the copy of the FIR, it was indeed transmitted by special peon to the nearest Magistrate in Muzaffarpur. Curiously, what we find is that column no.3 of the FIR, which required the date of dispatch of the copy of the document from the police station to be mentioned, does not contain the date of dispatch of the copy of the document. This could be in anybodies knowledge that Kanti and Muzaffarpur are not far off places and the two places are connected by National Highway



over which general commercial vehicles could be available every minute. If the special peon had left Kanti police station and we supposed on the same date, i.e., on 03.04.1983 it could have taken him an hour in the maximum to reach Muzaffarpur Civil Courts to deliver the copy of the special report to the nearest Magistrate. But, what we could find from the record made by the SDJM (West), Muzaffarpur regarding the receipt of the copy of the FIR is that it was received on 05.03.1983, i.e., after two days of the drawl of the FIR. We had yet another curious circumstance appearing from the record that the learned SDJM had not put any date under his signature, probably under some thoughtful consideration that putting a date could be more detrimental for the prosecution. This circumstance of belated dispatch and receipt of the FIR to us appears one of the circumstances which give an inkling as if the fardbeyan were also a cooked up document which was probably brought into existence belatedly with due deliberations and consultation and that appears more prominently coming from paragraph-22 of P.W.5 who stated in cross-examination that he had had recorded the fardbeyan of deceased Gurudayal Sahani, while he was lying in the hospital bed but on that particular time there was no staff of the hospital. There was no doctor present there and even his family members were not present there. Not only that he did not even have a glance of the person of deceased

Gurudayal Sahani so as to finding out the injury upon him and did not think it proper to assure himself that he was in a fit state of health to make statement.

19. Mere consistency in the evidence of prosecution witnesses has never to be treated as the hallmark of their truthfulness if circumstances otherwise appearing from the records of the case point out to some collusive attempt on the part of the police and the prosecution party to prepare an equally collusive report so as to foisting a charge upon the accused persons. It is never safe to place reliance upon the witnesses especially when some important persons named in the FIR were withheld by the prosecution. Deceased Gurudayal Sahani was indeed killed and how and by whom remains a mystery, specially because the dead body was carrying a tell tale evidence of smell of alcohol coming from it. The prosecution case was that deceased Gurudayal Sahani had just emerged from his house after taking his dinner and had sat at the *Darwaza* of P.W.9, completely overruling any possibility of deceased Gurudayal Sahani having taken alcohol. This also created a doubt in our mind as regards the circumstances under which deceased Gurudayal Sahani happened to receive injuries which ultimately proved fatal to him.

20. We have basic doubt in the prosecution case under the reasons which we have just recorded and on account of that doubt

we extend the benefit thereof to the accused persons.

21. In the result, the appeal succeeds and the same is allowed by giving the benefit of doubt to the appellants. They are acquitted of the charge they had been held guilty of. The appellants are on bail, they shall stand discharged from the liabilities of their individual bail bonds.

(Dharnidhar Jha, J.)

(Gopal Prasad, J.)

B.Kr./-Saif

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