

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.401 of 1992

Arising Out of P.S.Case No. 114 Year- 1982 Thana –Kharagpur District- MUNGER

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Sanjai Yadav son of Sri Bindeshwari Prasad Yadav, resident of village-
Ramankabad, P.S. Habeli Kharagpur, District- Munger.

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Shri Kanhaiya Prasad Singh, Sr. Advocate.

Shri Ambika Bhagat, Advocate.

For the Respondent : Miss. Shashi Bala Verma, 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: 07-08-2015

The present appeal is directed against the judgment of conviction and order of sentenced dated 07.09.1992 passed by the learned 3rd Additional Sessions Judge, Munger in Sessions Trial No.2 of 1984 by which he was convicted of committing offences under Section 302 of the Indian Penal Code and Section 27 of the Arms Act. After being heard on sentence, the appellant was directed to suffer rigorous imprisonment for life as also rigorous imprisonment for three years on the two respective counts with a further direction that the sentences imposed against the appellant were to run concurrently.

2. Deceased Kameshwar Prasad was an employee of the State Government and was working as Block Animal Husbandry Officer in Kharagpur Block and was allotted a Government



accommodation. His son informant Prasun Kumar along with his two sisters was also present in the house in the night intervening 17th and 18th of July, 1982. P.W.7 Prasun Kumar stated that at about 00.45 hours, i.e., 12.45 A.M. he heard some *Hulla* emanating from the guest room where his father Kameshwar Prasad was sleeping. He also heard sound of firing of shots and his father was also moaning by speaking '*Chor-Chor*'. The informant stated that he suspected that criminals had entered inside the house and they were committing some untowards incident with his father, but in spite of that neither he nor his sisters were opening the doors of the rooms. The informant further heard sounds of three shots being fired in the same room and they lastly, found that three persons were standing in the courtyard part of the premises and they were attempting to break open the rear gate. They had put on plain pant and *baniyan* and one of them was carrying a pistol while the other two were carrying bombs or crackers. The three criminals could not succeed in breaking open the rear gate, whereafter they only dislodged the doors by pushing them up the hook over which they had been fitted and exited from the premises by moving towards south.

3. The informant stated that on account of the sound which had emanated from the quarter, the servant of the house of Bangali Manjhi (not examined) with Manoj Kumar (P.W.12), Gopal Tanti (P.W.3) and Kaushal Kishore (not examined) who usually used

to come over the roof for reading and used also to sleep there, woke up and they had also seen the criminals running away. The deceased Kameshwar Prasad was unconscious.

4. The informant stated that after the criminals had gone, staff members of the Block Development Office had also assembled whereafter the informant opened the room in which he had slept during that night and they came to know about the occurrence. The informant stated that the three criminals were young persons out of whom, two were of dark complexion while the other was fair looking and the two criminals dark in complexion were of shorter height and if the informant had the opportunity of seeing them again, he could identify the criminals. It was also stated by the informant that he along with his sisters had gone to visit a cinema show in the evening of the previous day of incident and when they had come back to their house, the informant was talking to some other employees of the Block that people of the society want any work to be done by him by hook or by crook and he, as such, chastised one of such persons. Subsequently, the informant claimed that the man who had been chastised by his father whose name he did not know but whose application for getting aid for purchasing a buffalo had been returned by his father who had held out threats to the deceased. The informant stated that his father was shifted to the hospital, Kharagpur where he died during treatment because he had been hit by shots into his chest and right hand.



5. P.W.15 Md. Hasnain, the Investigating Officer of the case, stated that he had heard the sound of firing of gun coming from the Block Office-side and he made an entry to that effect in the station diary of the police station and had come to the premises of the residential flats in the Block Office where he recorded the fardbeyan Ext-2 of P.W.7 Prasun Kumar, on the basis of which, the FIR of the case Ext-1 was drawn up. He had held inquest upon the dead body of the deceased, recorded the statements of witnesses and after completing the investigation, sent up the solitary appellant for trial.

6. The appellant was in fact, arrested on suspicion on 05.08.1982 and was produced before the Chief Judicial Magistrate, Munger on 06.08.1982 for being remanded in the case and a test identification parade was organized by calling witnesses to attend the same on 06.09.1982 and the informant had identified the present appellant. It was the solitary material upon which the present appellant had been put on trial.

7. Sixteen witnesses were examined by the prosecution and there is no dispute in it that the deceased Kameshwar Prasad was shot dead by criminals. Witnesses examined in the case stated that deceased Kameshwar Prasad had been murdered P.W.6 Surendra Prasad Sah was an exception as he did not support the prosecution charge and who was declared hostile. But none of the witnesses stated that he had the opportunity of seeing and identifying the accused

except P.W.7. The two sisters of the informant who were also sleeping in a different room of the same quarter were not examined, but after having perused the evidence of witnesses, we do not have any doubt that deceased Kameshwar Prasad was indeed shot dead.

8. However, what appears concluded from the evidence is that none of the witnesses even P.W.7 could claim that he had identified any of the accused who had participated in the commission of the offence in the very night of the incident. P.W.7 Prasun Kumar in his evidence stated that he was called to attend the test identification parade of suspected accused and he had identified the present appellant as one of the criminals who had killed his father. P.W.14 Shri Abdul Rahman who was Judicial Magistrate, Munger on 06.09.1982 stated that he had conducted the test identification parade on 06.09.1982 in the District Jail, Munger after following the procedures set down by law for holding such parade and the solitary appellant Sanjai Yadav was identified by P.W.7 Prasun Kumar. However, what we find from his evidence is that there is no mention of the fact as to in what connection, the appellant was identified by P.W.7. The evidence of P.W.7 Prasun Kumar also does not indicate as to in what connection the present appellant had been identified- whether he was identified while standing in the courtyard as the person who was carrying a pistol or was carrying an arms or cracker or as the person who was attempting to break open the rear door.



P.W.7 or P.W.14 also did not appear stating that the present appellant was identified in connection with the lifting of the door from its hook so as to creating space for them to exiting from the place of occurrence by the accused persons. Not only that while perusing the evidence of P.W.7 what we found from paragraph-17 was that 27 suspects had been put on the parade out of whom some was of shorter height, while as the others were taller fellows and some of the suspects were of medium height. Some of the suspects were of dark complexion while the others were of fair complexion while some were in between the two complexions. Some of the suspects had put on shirt while the others were clad in *Pyjama* and *Khurta* while the other set of suspects had put on shirt and pant. If one could look to Rule 236 of the Bihar Police Manual, 1978, one could find that one suspect in the ratio of at least nine persons has to be mixed up in a line and those persons who have to be mixed with the suspect have to be almost of the same look and status. However, whatever has been stated by P.W.7 in paragraph-17 to which we just referred to gives, an impression to us that that particular precautionary rule was violated while organizing the test identification parade.

9. We have already noted that while identifying the solitary appellant Sanjai Yadav P.W.7 had not stated as to in which connection he had identified him. We want only to recall that mere identification of an accused is not the substantive evidence of



identification; it is a substantive evidence only when the identifying witness points out as to in which connection the accused had been identified which means, that the witness has to state to the court that he had seen the identified accused committing a particular act either of keeping a watch or any other overt-act as per the nature of the offence and that fact has to be stated by him to the Magistrate or the authority who oversaw such identification parade.

10. The other shortcoming of the evidence of identification which has come into our knowledge is that the appellant was arrested undisputedly on 05.08.1982 and he was put in the police lock-up at about 6 P.M. on the same day, i.e., 05.08.1982 and he was taken to the Courts with a forwarding report for being remanded in the case and for that purpose he was taken out of the police station lock up at 9 A.M. on 06.08.1982 (P.W.15 paragraph-10). We went through the evidence of P.W.15 in order to finding out as to whether there was any attempt made by the investigating officer to conceal the identifying features of the appellant while he was being sent with the forwarding report to the Court for being produced before the Magistrate for the purposes of remand under Section 167 Cr.P.C. We could not find any such evidence which could point out that the present appellant was produced before the Magistrate for remand after being taken from Kharagpur police station to the district headquarters in Munger after putting some mask or things like that so as to



concealing the identifying features of the appellant. Not only that after being remanded to custody by the learned Chief Judicial Magistrate, Munger on 06.09.1982, the appellant was produced before him again on two subsequent occasions, i.e., on 19.08.1982 and 01.09.1982. The judicial record has been perused by us as regards the orders of further remand passed on 19.08.1982 and 01.09.1982 and we find that there does not appear any mention in those orders passed by the learned Chief Judicial Magistrate, Munger as to in what state the appellant was produced before him. What we mean to say is that as to whether the precaution had been taken while producing the appellant before the Magistrate or while further obtaining orders of remand under Section 167 Cr.P.C. by fully concealing his identifying features. There is no mention of this fact in the two orders dated 19.08.1982 and 01.09.1982 and we could safely presume that no such attempt was made by the Jail authorities as well to conceal the identities of the appellant while he was being sent to the Court of Chief Judicial Magistrate, Munger from District Jail, Munger. There was a suggestion given to P.W.15 Md. Hasnain that after he had put the appellant in the police lock-up at 6 P.M. on 05.08.1982 and before he had taken him out for sending him for remand, he had informed P.W.7 and had brought him to the police station and had shown the appellant to him. P.W.7 was also suggested the same fact that the police had shown the appellant to him at the police station. Even if there had not



been a suggestion and even if we could not assume anything which could be in consonance with those suggestions, we could very safely conclude that while the appellant was being brought from the police station to the Court of Chief Judicial Magistrate, Munger for the purposes of obtaining the first remand order under Section 167 Cr.P.C on 06.08.1982 and when again the appellant was produced twice from the District Jail, Munger before the Chief Judicial Magistrate, Munger for passing the further orders of remand of the appellant into custody under the same provisions of the Cr.P.C., his face being made visible to all and sundry could have made it very easy for any one to see the appellant and then to identify him in the test identification parade held after one month of the arrest of the appellant, i.e., on 06.09.1982.

11. Rule 236A of the Bihar Police Manual 1978 lays down elaborate safeguards for concealment of identifying features of suspected accused and has very clearly directed that precautions must be taken by police officers and other authorities to bring the accused *ba-parda* to the Courts for remand purposes so that the accused is not seen by any of the witnesses who could be participating in the test identification parade. We find that that particular Rule 236 of the Bihar Police Manual, 1978 stands breached and violated by the prosecution making it highly suspects that it was a fair test identification parade which was organized by the prosecution for

gathering the evidence of identification regarding the participation of the present appellant in the commission of the murder of deceased Kameshwar Prasad.

12. While cross-examining witnesses including P.Ws.7 and 15, the defence had put certain questions to both of them on the fair conduct of the deceased as an employee of the State Government. P.W.15 had pointed out in paragraph -12 that during investigation he could know about the general reputation of the deceased as a public servant and it came into his knowledge that he was a bribe taker. The same question was put to P.W.7 in paragraph-14 of his evidence and that suggestion given to P.W.7 was strongly denied by him. The application for seeking the government aid in purchase of a buffalo filed by someone else had been returned by the deceased and that fact is very well mentioned in the fardbeyan itself. Why should a public servant whose duty was to process such applications as appears from the evidence of P.W.7 and without assigning reasons return such applications back which he has obliged to receive and process as part of his public functions. We cannot say many things, but we could simply suspect that the conduct of the deceased was not fair as appears from the evidence which was undisputed that he was the employee who was handling the processing of such applications and it appears that for any particular reason in discharging his official functions, which is admitted in paragraph-13 of P.W.7, he could have

earned the displeasure of many persons and it could be any one who could have committed the ghastly act of his murder. So far as the this appellant is concerned, we find the solitary evidence of identification of the appellant coming from the prosecution witnesses 7, 14 and 15 not enough to hold that the appellant was the person who had been one among the criminals.

13. On reappraising the evidence of the prosecution, we come to the conclusion that the prosecution had failed to prove the charges and the learned trial Judge fell in serious error in passing the judgment of conviction and order of sentence. The appeal, as such, is allowed by setting aside the judgment of conviction and order of sentence and also by acquitting by the appellant of the charges he had been held guilty of. The appellant is on bail, he shall stand discharged from the liabilities of his bail bonds.

(Dharnidhar Jha, J)

(Gopal Prasad, J)

Brajesh Kr./-

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