

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.768 of 2010

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Against the judgment of conviction and order of sentence dated 30.04.2010/06.05.2010 passed by Shri Ram Priya Sharan Singh, Additional Sessions Judge, Fast Track Court No. 2, Bhagalpur in Sessions Trial No. 878 of 2008 / Trial No. 9 of 2009.

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1. Ratuli Mandal son of Late Dhonu Mandal
2. Bouka Mandal son of Ratuli Mandal
3. Jichhu Mandal son of Late Luri Mandal
4. Fuldhar Mandal son of Late Luri Mandal
5. Gopi @ Gopia Mandal son of Late Geha Lal Mandal
All resident of village- Ekchari, P.S.- Ekchari (Pirpainti), District- Bhagalpur..... Appellants

Versus

The State of Bihar..... Respondent

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Appearance :

For the Appellants : Mr. Pramod Kumar Singh, Advocate
Mr. Dharmendra Kumar Singh, Advocate
For the Respondent : Mr. A.K. Sinha, APP

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CORAM: HONOURABLE MR. JUSTICE V.N. SINHA
and
HONOURABLE MR. JUSTICE JITENDRA MOHAN SHARMA

ORAL JUDGMENT

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

Date: 08-09-2015

The present appeal arise out of judgment and order dated 30.04.2010/06.05.2010 passed by Additional Sessions Judge, Fast Track Court No. 2, Bhagalpur in Sessions Trial No. 878 of 2008 / Trial No. 9 of 2009 whereunder the five appellants have been convicted for the offence under Sections 302/149, 148 of the penal code and 27 of the Arms Act and awarded sentence of rigorous imprisonment for life and fine of Rs. 5,000/- each under Section 302/149 of the penal code, in default of payment of fine to undergo further rigorous imprisonment for one year, under

Section 148 of the penal code they are sentenced to suffer rigorous imprisonment for two years, under Section 27 of the Arms Act they have been directed to suffer rigorous imprisonment for three years, pay fine of Rs. 3000/- each and in default of payment of fine, to suffer rigorous imprisonment for six months. The sentences, however, have been directed to run concurrently.

2. Prosecution case as set out in the fard-beyan of Kapuri Mandal son of Bhim Mandal, resident of village Tintanga, P.S.- Naugachiya, District- Bhagalpur, for the present residing in village Ekchari Diyara, P.S.- Ekchari (Pirpanti), District- Bhagalpur scribed by S. I. R.S. Jaumda, Officer In-charge, Ekchari Police Station in village Ekchari Diyara near the house of his maternal uncle Aghanu Mandal on 05.10.1998 at 4:00 am is that in the night between 4/5.10.1998 mother of the informant Domini Devi after taking dinner was sleeping on the eastern Veranda situate in the western side of the house, informant and his maternal grandfather Jitan Mandal was sleeping in the courtyard in front of eastern Veranda on a bench, two neighbours of his maternal uncle Aghanu Mandal, namely, Ghuran Mandal and Gujjo Mandal were also sleeping on the same Veranda on a gunny bag and wooden piece of a broken wooden bed (chauki). Around 12.00 mid night, 40 miscreants variously armed, came and surrounded the house of his maternal uncle Aghanu Mandal. On noise being raised, informant woke up and saw the miscreants surrounded the house, fired 2-3 shots on his maternal grandfather Jitan Mandal who was



sleeping on the bench. Few other miscreants entered the house, came to the eastern veranda, shot at Ghuran Mandal and Gujjo Mandal. The miscreants also shot at the mother of the informant twice and she fell beneath the cot. Amongst the miscreants, the informant identified in the moon light Ras Bihari Mandal, Suro Mandal, accused no. 1 Jhichho Mandal, accused no. 2 Phuldhar Mandal, accused no. 5 Ratuli mandal, accused no. 3 Bouku Mandal all resident of village Ekchari Diyara and 15 others including accused no. 4 Gopi Mandal @ Gopia Mandal as also 15-20 unknown. The miscreants having killed aforesaid four persons made good their escape on the western side of the village. Informant further stated in his fardbeyan that he has learnt that while the miscreants were making good their escape they shot Tetar Mandal and Chamuk Lal Yadav and thereafter boarded mechanized boat in river Ganga near old police station and escaped towards west. The motive for the occurrence is the struggle for supremacy between the gang of Ras Bihari Mandal and Dina Yadav. It is also stated in the fardbeyan that both these gangs always indulge in fighting with each other. The miscreants had come in search of the maternal uncle of the informant but he having not been found, his family members were killed as the maternal uncle of the informant is constant companion of Dina Yadav. Informant also stated in the fardbeyan that the occurrence could not be reported earlier in the police station as there was fear during night. The contents of the fardbeyan having been read



by and read over to the informant, the informant having understood the same and found correct put his signature over the fardbeyan. The Officer In-charge Ekchari Police Station forwarded the fardbeyan to Officer In-charge Pirpainti Police Station for instituting the case under Sections 147, 148, 149, 302 of the penal code and 27 of the Arms Act with further endorsement that he has already taken up its investigation. In the light of the fardbeyan of Kapuri Mandal, S. I. of Pirpainti Police Station registered first information report vide Ekchari P.S. Case No. 182 dated 05.10.1998 at 3:00 pm which was received in the court on 07.10.1998. Perusal of the first information report, however, indicates that the column no. 15 whereunder the officer who registered the first information report is required to mention the date and time of dispatch has not been filled up and kept blank. In the circumstances, it may not be possible for us to find out from the records as to when the first information report was dispatched from the Police Station to the Court. In the light of the fardbeyan, Officer In-charge Ekchari Police Station after forwarding the fardbeyan of Kapuri Mandal proceeded to conduct inquest proceedings over the dead bodies of Jitan Mandal, Ghuran Mandal, Gujjo Mandal and Domini Devi in the veranda of the house of Aghanu Mandal in the morning of 05.10.1998. After conducting inquest proceedings of the four dead bodies, the Officer In-charge went to the western Tola village Ekchari and found the dead bodies of Tetar Mandal and Chamuk Lal Yadav and



conducted inquest proceedings of those two dead bodies also on 05.10.1998 around 6:30, 6:45 am. From perusal of the inquest reports of the six deceased (Exts. 5 to 5E) it will appear that the six deceased were done to death by inflicting firearm injuries. After completing inquest proceedings, six dead bodies were sent to Jawahar Lal Medical College and Hospital, Bhagalpur for conducting autopsy on them. The 6 dead bodies were received in the Medical College on 05.10.1998 in the evening, the post mortem was conducted next day on 06.10.1998. From the post mortem reports of the six deceased (Ext. 4A to 4E) also it is evident that the six deceased suffered death due to firearm injuries. In the light of the contents of the fardbeyan and the statement of the witnesses recorded by the Investigating Officer of the case as also the contents of the inquest, post mortem reports, the Investigating Officer having found the occurrence true submitted chargesheet against 23 accused persons, namely, 20 named persons in the first information report and three others. In the light of the chargesheet, cognizance for the offence found true during investigation was taken. Later appellant nos. 1 and 2 appeared in the present case after securing their remand from GR Case No. 1457 of 1988 and GR Case No. 284B of 1999 respectively, appellant no. 3 appeared in the present case after securing his remand from Sabour P.S. Case No. 10 of 2008, appellant no. 4 appeared in the present case after securing his remand from Sessions Case No. 769 of 2005 arising out of

Ghogha (Kahalgaon) P.S. Case No. 52 of 2001 and appellant no. 5 appeared in the present case after securing his remand from Pirpanti P.S. Case No. 160 and 161 of 2007 and after supply of police papers to the accused persons the case was committed to the court of Sessions.

3. The Sessions Court under order dated 27.06.2001 framed charge against Bishnu Mandal, Sutho Mandal, Manoj Kapuri, Kishan Mandal, Jaikant Mandal, Shyam Lal Yadav, Anil Yadav. While the trial of the aforesaid 7 accused persons was in progress, the Sessions Court under order dated 09.07.2003 framed charge against Ras Bihari Mandal and Gudla Mandal. While the aforesaid trial against 7 and 2 accused persons remained pending, the Sessions court under order dated 10.08.2007 framed charge against accused Tarni Mandal. The charge against 5 appellants herein was, however, framed under order dated 25.08.2008 to which the 5 appellants pleaded not guilty and claimed to be tried.

4. The trial of Ras Bihari Mandal, Gudla Mandal bearing Sessions Trial No. 378 of 2003 was disposed of under judgment dated 30.04.2008 wherein the Sessions court having considered the evidence of the informant herein as also Laxman Mandal and his son Nand Kishore Mandal acquitted both Ras Bihari Mandal and Gudla Mandal under judgment dated 30.04.2008. The case of Vishnukant Mandal and 6 others bearing Sessions Trial No. 697 of 2000 and Tarni Mandal bearing Sessions Trial No. 902 of 2007



also ended in acquittal under judgment dated 30.04.2010. On 30.04.2010 the case of these 5 appellants was also disposed of by the impugned judgment wherein they have been convicted as stated above. It would thus appear that under judgment dated 30.04.2008 and three judgments dated 30.04.2010 the case of 15 chargesheeted accused have been dealt with. The case of remaining 8 accused persons, namely, Suri Mandal, Vakil Mandal, Rama Mandal, Uchit Mandal, Ayodhi Mandal, Ganesh Mandal, Kedar Mandal and Sukhay Mandal has been separated under order dated 17.07.2008 for the reason that they were not available on the date when case of these five appellants was committed to court of Sessions.

5. Prosecution, in order to support the charge, examined as many as 13 witnesses. PWs 1 to 4, 8 are co-villagers of the informant and the deceased but perusal of their evidence indicate that they are hearsay witness. PW 5 Nand Kishore Mandal is the brother of the two deceased, namely, Ghuran Mandal and Gujjo Mandal, is named in the fardbeyan and is an eye witness of the occurrence. PW 6 Susan Mandal, PW 9 Subhash Mandal both have been declared hostile. PW 7 Kapuri Mandal is the informant of the case. PW 10 Laxman Mandal is the father of the deceased Ghuran Mandal and Gujjo Mandal as also PW 5 and named in the fardbeyan as an eye witness of the occurrence. PW 11 Dr. S.P. Lal conducted post mortem on the person of the six deceased. PW 12 Rai Singh Jamuda scribe of the fardbeyan and Investigating

Officer of the case. PW 13 Raj Kumar Mandal is an eye witness and named in the fardbeyan.

6. Learned counsel for the appellants assailed the conviction and sentence imposed on these five appellants and submitted that the evidence of the informant (PW 7), Laxman Mandal (PW 10), Nand Kishore Mandal (PW 5) son of PW 10 may not inspire confidence in this Court to maintain the conviction of the five appellants. In this connection, while referring to the evidence of PW 5 Nand Kishore Mandal son of Laxman Mandal, learned counsel referred to paragraph iv of his evidence (at page 25 of the paper book) and submitted that in the said paragraph PW 5 has stated that he saw the occurrence after concealing himself and had deposed twice earlier in connection with the same occurrence. PW 5 further deposed that in the trial in which Ras Bihari was accused, he stated that he does not know anything about the occurrence but clarified in his present deposition that he made such statement as he was threatened by Ras Bihari Mandal that if he will depose against him, he may be killed and because of the apprehension of being killed, he did not depose correctly in the said trial. The witness, however, admitted that he had not recorded any Sanha entry in connection with the threat extended to him by Ras Bihari Mandal. In Tarni Mandal case also witness accepted that he deposed that he identified amongst the miscreants only Suro Mandal and not any other miscreants. It is submitted that PW 5 was under threat not to depose against

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Ras Bihari Mandal but his deposition in the case of Tarni Mandal is very clear as in the said trial he categorically stated that he only identified Suro Mandal amongst the miscreants who was also not facing trial with Tarni Mandal like the present appellants. It is submitted that as PW 5 in the trial of Tarni Mandal clearly stated that he could only identify amongst the miscreants Suro Mandal who was not an accused facing the said trial, if at all he had identified these appellants amongst the miscreants then he was required to have named these appellants along with Suro Mandal.

7. Learned counsel next referred to the evidence of the informant Kapuri Mandal (PW 7) and submitted that in paragraph 1 of his evidence he has claimed that at the time of occurrence he was in the courtyard of his house when the 40 members of gang of Ras Bihari Mandal has surrounded the house of Jitan Mandal amongst whom he identified the 5 appellants who killed the six deceased. Learned counsel with reference to his evidence in paragraph viii at page 32 of the paper book submitted that in connection with the same occurrence this witness had deposed earlier as well and denied the suggestion that he has not stated in the earlier deposition that he saw the occurrence after concealing himself behind the stack of the bundles rather asserted that he saw the occurrence from the room which is facing east and there is a entrance gate on the northern side of the house which was open when he was watching the occurrence.

8. Learned counsel next referred to the evidence of



PW 10 Laxman Mandal father of deceased Ghuro Mandal and Gujjo Mandal as also of PW 5. He has stated in his evidence that at the time of occurrence he was sleeping in the courtyard of his house and got awake hearing the gunshots being fired but being fearful remained inside the house. His wife Saro Devi went out and saw her two sons being killed by the miscreants. This witness, however, claimed that during occurrence he identified the 5 appellants. Learned counsel referred to paragraph iv of his evidence where PW 10 admitted that in connection with the same occurrence he recorded his deposition earlier also but denied the suggestion that in the earlier deposition he has not stated that he is not aware about the occurrence and that Police has not recorded his statement. In the present trial also he denied the suggestion that he is not aware about the occurrence. Learned counsel submitted that from the evidence of PW 10 itself it will appear that at the time of occurrence he was inside his house and remained there until the departure of the miscreants as he was fearful of the miscreants. In the background of the said evidence, learned counsel submitted that the subsequent claim of PW 10 that he identified the 5 appellants amongst the miscreants is the wishful thinking of PW 10 and his evidence should not persuade this Court to maintain the conviction of the appellants.

9. Learned counsel finally referred to the evidence of PW 13 in paragraph ii, iii and iv at page 62 of the paper book and submitted that at the time of occurrence PW 13 was sleeping at



the roof of the house of his maternal uncle Jitan Mandal. He came down from the roof after the miscreants surrounded the house and had entered the house and remained inside for about half an hour. Learned counsel submitted that from the evidence of PW 13 it will appear that when the miscreants had come to the place of occurrence, he was at the roof and by the time he came down, the miscreants had already entered the house and the witness perhaps had no opportunity to identify the miscreants and he has rightly stated that he could not see which of the miscreants had shot whom, thereby, disputed the claim of identification of the appellants amongst the miscreants by PW 13 in his examination in chief. In this connection, he also referred to the admission made by PW 13 in paragraph 2 of his deposition that earlier in the same case he had deposed on three occasions stating that the witness is not aware about the occurrence. It is submitted that as the witness was not aware about the occurrence, his present deposition is an attempt to falsely implicate these appellants who are his co-villagers. PW 13 while deposing in this case explained that his earlier deposition was recorded because he was under threat of being killed. It is submitted that PW 13 keeps on changing his stands about the identity of the accused persons which is a good ground for not accepting his evidence in the present case as well.

10. In this connection, learned counsel pointed out that having considered the aforesaid evidence of PWs 5, 7, 10



and 13 Ras Bihari Mandal, Gudla Mandal, Tarni Mandal, Vishnukant Mandal and six others were acquitted under judgment dated 30.04.2008 (Ext. A) and 30.04.2010 and in the present case the depositions of the aforesaid witnesses is required to be considered with caution as it is these witnesses who have earlier deposed that they are unaware about the occurrence. In this connection, specific reliance has been placed on the deposition of PW 5, PW 10 and PW 13. Learned counsel further submitted that the deposition of these very witnesses having been considered in Ext. A and the trial court acquitted the accused persons facing that trial, the same result should follow in the present case. Reliance, in this connection, has been placed on the judgment of the Supreme Court in the case of **Brijbasi Lal Shrivastava Versus State of Madhya Pradesh** reported in **(1979) 4 Supreme Court Cases 521** (paragraph 10) and another case also of Supreme Court in the case of **Dhanabal and another v. State of Tamil Nadu** reported in **AIR 1980 Supreme Court 628** (paragraph 24). It is submitted that such submission is being made with reference to Section 155 of the Evidence Act as Sub-clause 3 of Section 155 provides for impeaching the credit of a witness with reference to his former statements. The reliance placed on the judgment of the Supreme Court, in the case of **Brijbasi Lal Shrivastava** (*Supra*) in this regard appears to be misconceived as in the said judgment the trial court in the first case rightly refused to place reliance on the extra judicial



confession of the accused and acquitted him. The trial court in the second trial placing reliance on the same extra judicial confession has convicted him which conviction was also upheld by the High Court. The Supreme Court while setting aside the conviction observed that the judgment given in the first trial is relevant and admissible in the subsequent trial. Such observation of the Supreme Court was made in the peculiar facts of the case as also considering the conviction that the subsequent conviction could not have been made placing reliance on the extra judicial confession of the accused.

11. Learned counsel for the State on the other hand has submitted that the judgment Ext. A in the case of Ras Bihari Mandal has been rendered in the light of the evidence led in that case may be on account of threat extended by Ras Bihari Mandal, as such, according to learned counsel for the State, Ext. A will have no bearing in the present case as the present case has to be considered in the light of the evidence recorded in the present case and according to Shri A. K. Sinha, learned APP, all the four material witnesses, namely, PW 10, his son PW 5, informant PW 7 and PW 13 have categorically explained their evidence in the earlier trial Ext. A that their evidence in the said trial was on account of threat extended by Ras Bihari Mandal. The present appellants being the co-villagers of PWs 5, 7, 10 and 13 they had all the opportunity in the moonlit night to identify the appellants from amongst the miscreants. In this connection, he referred to



the judgment of the Supreme court in the case of **Rajan Rai Versus State of Bihar** reported in **(2006) 1 Supreme Court Cases (Cri) 209** (paragraphs 8 and 10) and submitted that like in the reported case of **Rajan Rai** (*supra*) in the present case also PW 5, PW 7, 10 and 13 have explained the circumstances in which they did not identify the miscreants on account of threat but in the present case they along with the informant have identified the appellants amongst the miscreants, as such, there cannot be any escape for them and their conviction is required to be maintained.

12. We have considered the evidence of PW 10 the father of the deceased, his son PW 5 the brother of the deceased namely, Ghuran Mandal and Gujjo Mandal. In the circumstances, PWs 5 and 10 had no reason to spare the assailants of their close relative and to falsely implicate these five appellants. It further appears that PW 10 was sleeping at the roof of the house of Jitan Mandal, after the arrival of the miscreants he came down and concealed himself behind the grass bundles and watched the occurrence from behind the bundles and claimed to have identified the appellants in the moonlit night from behind the bundles, such claim of identification corroborated by his son PW 5 and the informant PW 7 as also PW 13. Admittedly, informant was inside the house where the killings have taken place and he saw these appellants amongst the miscreants from the corner of his room while the miscreants were on the Veranda as has been explained by him in paragraph vii of his evidence at page 32 of



the paper book. In the circumstances, we have no reason not to believe the informant. Once we believe the evidence of the informant PW 7, the conviction of the appellants has to be maintained. Learned counsel has pointed out that one of the appellants namely, Ratuli Mandal was 80 years of age on the date of judgment and, considering his age, was granted bail during the pendency of the appeal. Advance age of Ratuli Mandal cannot be a ground to distinguish his case from that of the other appellants as he has also been identified amongst the miscreants by the four material witnesses.

13. In the circumstances, while dismissing the appeal we direct the accused Ratuli Mandal to surrender forthwith, other appellants are in custody, they will continue to serve their sentence.

(V.N. Sinha, J)

(Jitendra Mohan Sharma, J)

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