

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.137 of 1993

Against the judgment of conviction, dated 25.02.1993, and the order of sentence, dated 26.02.1993, passed by Shri Jaleshwar Ram, 1st Additional Sessions Judge, East Champaran, Motihari, in Sessions Trial No. 211/40 of 1987, arising out of Ghorasahan Police Station Case No. 100 of 1984

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1. Ramashish Mahto, son of late Satya Narayan Mahto,
2. Deochand Mahto, son of Ramashish Mahto
3. Lal Babu Mahto, son of Ramashish Mahto
4. Sonelal Mahto @ Sonalal Mahto, son of Indrajit Mahto.
All residents of village Naraura, Police Station Ghorasahan,
District- East Champaran.

.... Appellants

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellants : Mr. Mayanand Jha, Amicus Curiae
Mr. Bindeshwar Pd. Singh, Advocate.
Mr. Arun Kumar, Advocate.

For the Respondent : Mr. Ajay Mishra, A.P.P.

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**CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI
AND
HONOURABLE MR. JUSTICE SAMARENDRA PRATAP
SINGH**

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE I. A. ANSARI)

Date: 04-02-2015

By the impugned judgment, dated 25.02.1993,
passed, in Sessions Trial No.211/40 of 1987, by the learned
1st Additional Sessions Judge, Motihari, the present four
appellants, namely, Ramashish Mahto, Deochand Mahto, Lal
Babu Mahto and Sonelal Mahto @ Sonalal Mahto, stand
convicted under Section 302 read with Section 34 of the

Indian Penal Code. Following their conviction, as mentioned hereinbefore, the learned 1st Additional Sessions Judge, Motihari, has sentenced them, on 26.02.1993, to suffer imprisonment for life.

2. The prosecution's case, as unfolded, at the trial, may, in brief, be described as under:

(i) On 15.10.1984, Birendra Kumar Sinha (since deceased) had purchased 8 dhurs of land from his co-villager Hira Mahto, the land so purchased by the said deceased being located within the boundary of the accused-appellants. Enraged by the fact that Birendra Prasad Sinha had purchased the said land despite the fact that the land fell within the boundary of the appellants, they threatened the deceased that they would kill him.

(ii) On 18.10.1984, the appellants were seen sharpening various weapons, such as, spear, *garasa* etc. at the door of their house. At about 6.30 P.M., on 18.10.1984, when the deceased, taking a pot of water, went to clear his bowels at the paddy field, located on the northern side of his house, the accused-appellants assaulted him and killed him. However, while the accused-



appellants were running away with weapons of assault in their hands, they were seen by PW 3 Ram Ekbal Mahto. This apart, even PW 2, Surendra Prasad, a neighbour of the said deceased, had seen and heard the accused-appellant, Sonelal, reporting to the mother of the accused-appellant, Deochand Mahto, that he was coming after finishing his work. A shortwhile, thereafter, *hulla* was raised from the direction of the paddy field, where the said deceased had gone to clear his bowels, and when Dharmendra Kumar, son of the deceased, and other members of his family, including Birendra Kumar Sinha's wife, namely, Jaleshwari Devi (PW 5), and their co-villagers went rushing to the paddy field, they found Birendra Kumar Sinha lying dead with multiple injuries on his body.

(iii) The police were informed by Dharmendra Kumar and, on arrival of the police, *inquest* was held on the dead body and wearing apparels of the deceased were seized.

(iv) On completion of investigation, police laid *charge sheets*, under Section 302 read with Section 34 of the Indian Penal Code, against as

many as eight persons as accused; but out of them, one accused, namely, Basant Mahto, absconded resulting in separation of his trial from the trial of the remaining accused. This apart, one accused, namely, Manoj Mahto, died during trial

3. At the trial, when a charge, under Section 302 read with Section 34 of the Indian Penal Code, was framed against the accused aforementioned, they all pleaded not guilty to the charge.

4. In support of their case, prosecution examined as many as 11 (eleven) witnesses. The accused persons were, then, examined under Section 313(1)(b) Cr.P.C. In their examinations aforementioned, all the accused persons denied that they had committed the offence, which was alleged to have been committed by them, the case of the defence being that of the denial. No evidence was, however, adduced by the defence.

5. At the end of trial, the learned trial Court convicted four of the accused persons, namely, Ramashish Mahto, Deochand Mahto, Lal Babu Mahto and Sonelal Mahto @ Sonalal Mahto, under Sections 302 read with Section 34 of the Indian Penal Code, and, in consequence thereof, they have been sentenced to suffer imprisonment for life, as has

been mentioned above. Two of the accused persons, namely, Ramashray Mahto and Achchelal Mahto, were, however, acquitted at the trial.

6. Aggrieved by their conviction and the sentence, which has been passed against them, the convicted persons, namely, Ramashish Mahto, Deochand Mahto, Lal Babu Mahto and Sonelal Mahto @ Sonalal Mahto, have preferred this appeal.

7. We have heard Mr. Arun Kumar, learned Counsel, appearing on behalf of the appellants, and Mr. Ajay Mishra, learned Additional Public Prosecutor, appearing on behalf of the State. We have also heard Mr. Mayanand Jha, learned Counsel, who has appeared as *Amicus Curiae*.

8. While considering the present appeal, what needs to be pointed out, at the very outset, is that no witness was, admittedly, examined as a witness to the alleged occurrence of assault on, and killing of, the said deceased. This apart, though the *post mortem* report has been brought on record, the doctor, who had performed the *post mortem* examination, was not examined as a witness nor was examined the investigating officer of the case despite the fact that the case at hand depends on circumstantial evidence.

9. Bearing, therefore, in mind the above

noticeable features of the present case, we are, now, required to determine if the conviction of the appellants can be sustained.

10. Our quest for an answer to the question posed above brings us to the evidence of PW 2 (Surendra Prasad), a neighbour of the said deceased. His evidence is that about a little over five years back, Birendra Prasad Sinha was murdered at about half-past five in an evening and at that time, when he (PW 2) was at the door of his house, accused Sonelal came there and reported to the mother of accused Deochand Mahto, who was sitting in front of the house of PW 2, that he (Sonelal) had come after finishing his work and, thereafter, there was *hulla* that a dead body was lying on the road and when he went towards the road, he found Birendra Prasad Sinha lying dead with injuries on several parts of his body.

11. Though it is in the evidence of PW 2 that three days prior to the occurrence, Birendra Prasad Sinha had got a sale-deed of land executed by Hira Lal and the purchase so made by Birendra Prasad Sinha had strained the relationship between Birendra Prasad Sinha, on the one hand, and the accused aforementioned, on the other, inasmuch as the accused had enquired from Birendra Prasad Sinha as to why he had purchased the land and threatened



him that they would kill him, it is noteworthy that the evidence so given by PW 2 to the effect that the accused had enquired from the said deceased as to why he had purchased the land and that the accused had threatened the said deceased, there is no indication as to how PW 2 came to learn about these events. Was he an eyewitness to the enquiry, which was alleged to have been made by the accused persons from the said deceased or was it in his presence that the said deceased was threatened by the accused as alleged by PW 2? The evidence on record furnish no answer.

12. The learned trial Court did not make any endeavour to find out how PW 2 got to learn that an inquiry had been made from the said deceased by the accused persons as to why he (deceased) had purchased the said land nor did the learned trial Court try to ascertain as to how PW 2 had come to know that the said deceased had been threatened by the accused persons.

13. The evidence, thus, given by PW 2 that the accused had threatened the said deceased cannot be relied upon, his evidence given, in this regard, being too vague and unintelligible.

14. Reverting to the evidence of PW 2 given to the effect that he had heard accused Sonelal reporting to



accused Deochand's mother that he (Sonelal) had come after finishing his work, it is of great significance to note, in this regard, that this piece of evidence given by PW 2 does not prove any of the accused including accused Sonelal to be the assailant unless there is some other evidence pointing to the accused –appellants or, at least, accused-appellant Sonelal, as the assailant of Birendra Prasad Sinha (since deceased).

15. So far as PW 5, the mother of the informant Dharmendra is concerned, her evidence is that the occurrence had taken place at about 7 O' clock in the evening when she was at home and, upon hearing *hulla* that a dead body was lying near *Sami Mai Asthan*, his son, Dharmendra (informant, not examined) went to see the dead body and when he did not return, she (PW 5), too, went there and found the dead body to be that of her husband.

16. Situated thus, it becomes apparent that neither the evidence of PW 2 nor the evidence of PW 5, when read in isolation, or with each other, prove any of the accused-appellants as the assailant.

17. Coming to the evidence of PW 3 (Ram Ekbal Mahto), it may be noted that his evidence is that prior to the day of the occurrence, on Wednesday, he saw the accused persons sharpening their spears and PW 3 heard that they were telling that Birendra Prasad Sinha would have to pay by



his life for the land, which he had purchased, and the said remark, made by the accused, was communicated by him (PW 3) to his uncle, Birendra Prasad Sinha (since deceased), and, on Thursday, which was the day of occurrence, a religious ceremony was held at his house, which was over by about half- past-four and when he went out with a pot of water in his hand, he (PW 3) had seen the accused persons running away from north to south and, at that time, accused Sonelal Mahto was holding a dagger in his hand, while accused Deochand Mahto had a spear in his hand and when he returned home, he learnt that Birendra Prasad Sinha had been murdered, whereupon he went to the place of occurrence and saw Birendra's dead body lying with multiple injuries on his body.

18. While considering the credibility of the evidence of PW 3, it needs to be pointed out that the defence had suggested to this witness that in his previous statement made before the police during investigation, he had not stated, contrary to the evidence given by him in the Court, that he had seen the accused sharpening their spears or making remarks that Birendra Prasad Sinha would be paying by his life for purchasing the land and/or that he had reported about what he had seen and heard to his uncle, Birendra Prasad Sinha, and that he had seen the accused



persons running away, as he has claimed in his evidence. Though this witness (PW 3) has asserted that he had, indeed, made such a statement to the police, the defence was denied the opportunity of eliciting from the Investigating Officer as to whether this witness had made any such statement during investigation or not inasmuch as the Investigating Officer was not examined as a witness at the trial.

19. Coupled with the above, the evidence, so given by PW 3, as indicated above, was never put to the accused-appellants at the time, when they were being examined under Section 313 (1)(b) of the Code of Criminal Procedure and since the evidence, so given by PW 3, had not been put to the accused-appellants, the evidence so given by PW 3 could not have been used, and ought not to have been used, by the learned trial Court for the purpose of convicting the accused-appellants.

20. We might have considered setting aside the conviction of the accused-appellants and remanding the matter to the learned trial Court for proper examination of the accused-appellants under Section 313 (1)(b) of the Code of Criminal Procedure, the evidence, given by PW 3, in his cross-examination, restrains us from taking recourse to the remand of the case inasmuch as we notice that in his cross-

examination, PW 3 has claimed that when he was returning he had met Jagdeo Ram (PW 7) and reported to him also that he had seen the accused persons running away.

21. Close on the heels of the evidence of PW 3, when we turn to the evidence of PW 7 (Jagdeo Ram), we notice that this witness (PW 7) has, nowhere, deposed that in the evening of the day of occurrence or following the occurrence, he had met PW 3 and PW 3 had reported to him that he (PW 3) had seen the accused persons running away with weapons in their hands. In fact, evidence of PW 7 is merely to the effect that one evening, at about 6 O' clock, Birendra Prasad Sinha had been killed and the police had come, examined the dead body, and seized, in his presence the blood stained soil, apparels and a *lota* (i.e., a pot). As the evidence given by PW 7 does not lend support to the evidence of PW 3, we find it wholly unsafe and extremely hazardous to place any reliance on the evidence of PW 3 and, therefore, the question of remanding the case to the learned trial Court for appropriate examination of the accused-appellants, under Section 313 (1)(b) of the Code of Criminal Procedure, would not improve the case of the prosecution.

22. We are, now, left with evidence of PW 6, who is the headman of the village and his evidence is that about



one-and-half-hour prior to the occurrence, the said deceased had come to him and informed him that he had purchased a piece of land from Hira Lal, which was claimed by his coparceners and since the said deceased had not paid the consideration money, he wanted to know from PW 6 if he (deceased) shall make the payment. It is in the evidence of PW 6 that he advised the said deceased to call Hira Lal. PW 6 has clearly deposed that Birendra Prasad Sinha (since deceased) had not taken the name of any other person meaning thereby that though shortly before his death, the said deceased had not disclosed to PW 6 that he had been threatened by the accused persons.

23. What emerges from the evidence on record, which we have discussed above, is that there is no cogent, clear, convincing, reliable and credible evidence on record to hold that the accused-appellants had threatened the said deceased and/or that they had been seen returning from the direction of the place of occurrence with various weapons in their hands.

24. In the circumstances placed as we are, we are clearly of the view that the prosecution has miserably failed to prove their case, far less beyond reasonable doubt, against the accused-appellants and the accused-appellants could not have been, and ought not to have been, convicted

on the basis of such scanty evidence, which was wholly untrustworthy, unreliable and unsafe.

25. Because of what have been discussed and pointed above, we allow this appeal and set aside the conviction of the accused-appellants and the sentence passed against them by the judgment and order under appeal.

26. Bail bonds of the accused-appellants are hereby cancelled and their sureties shall accordingly stand discharged.

27. Let the Amicus Curiae be paid a fee of Rs.5,000/-.

28. Let the Lower Court Records be sent back to the learned Court below with a copy of this judgment and order.

(I. A. Ansari, J.)

(Samarendra Pratap Singh, J.)

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