

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (SJ) No.516 of 2002**

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1. RAM EKWAL RAI, SON OF LATE BHULLOOR RAI,
  2. RAM NARESH RAI, SON OF LATE RAM CHANDRA RAI.
  3. NATHUNI SAH, SON OF LATE KISHUNI SAH.
  4. YUGAL RAI, SON OF PRAKASH RAI.
- ALL RESIDENTS OF VILLAGE-BASAHA, POLICE STATION-BAJPATTI,  
DISTRICT-SITAMARHI.

.... .... Appellant/s

Versus

The State of Bihar

.... .... Respondent/s

With

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**Criminal Appeal (SJ) No. 517 of 2002**

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RAM NATH RAI, SON OF LATE NATHUNI RAI, RESIDENT OF VILLAGE-  
JAMLA, POLICE STATION-MAJORGANJ, DISTRICT-SITAMARHI.

.... .... APPELLANT/S

Versus

The State of Bihar

.... .... Respondent/s

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**Appearance:**

**(In CR. APP (SJ) No. 516 of 2002)**

For the Appellant/s : Mr. Abhimanyu Sharma, Adv.

For the Respondent/s : Mr. S.N. Prasad, APP

**(In CR. APP (SJ) No. 517 of 2002)**

For the Appellant/s : Mr. Abhimanyu Sharma, Adv.

For the Respondent/s : Mr. Binod Bihari Singh, APP

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**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**

**ORAL JUDGMENT**

**Date: 29-01-2015**

**1.** Heard learned counsel for the appellants as well as  
learned Additional Public Prosecutor.

**2.** Cr. Appeal (SJ) No.516 of 2002 wherein Ram Ekwai  
Rai , Ram Naresh Rai , Nathuni Sah , Yugal Rai are appellants  
while in Cr. Appeal (SJ) No.517 of 2002 wherein Ram Nath Rai is  
the sole appellant, commonly originate out of judgment of  
conviction and sentence dated 31-08-2002 delivered by Presiding  
Officer, FTC-II, Sitamarhi in Sessions Trial No.248 of 1987, 252 of  
1987, 92 of 2002 convicting all the appellants for an offence



punishable under Section 399, 402 IPC, directing each of them to undergo R.I. for 10 years as well as slapped with fine of Rs.2000/- in default thereof, to undergo S.I. for six months, R.I. for seven years, fine of Rs.2000/- in default thereof, to undergo S.I. for six months, with a further direction to run the sentences concurrently, have preferred these appeals. As such have been heard analogously and are being disposed of by a common judgment.

**3.** PW-2, Chandra Bhushan, Officer-in-charge of Majorganj P.S. filed written report on 17-01-1983 divulging the fact that after being informed confidentially regarding assemblage of dacoits under the leadership of renowned criminal Ram Swaroom Rai, at village-Bangraha lying under Bajpatti, to commit dacoity and on account thereof, after informing of concern, raided the place with assistance of concerned police and found 12-14 persons near the Khalihan of Mukhiya, Sikandar Rai at village-Bangraha who at that very moment were engaged in eating and drinking. Having torch flashed over them was perceived as arrival of police party and on account thereof, they began to escape. However, during course thereof, six persons were apprehended out of whom, from the possession of one Yugal Rai one 12 bore cartridge, from the possession of Ram Ekbal Rai, one 12 bore cartridge, one blank cartridge were seized. Being so, all have been booked in the present case.

**4.** After institution of Bajpatti P.S. Case No.4 of 1983, investigation was taken up followed with submission of charge

sheet whereupon, being the offences exclusively triable by the court of Session, met with committal and on account thereof, trial commenced and concluded in a manner, the subject matter of these appeals.

**5.** The defence, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial of the occurrence coupled with the theme of false implication. However, neither any DW nor any document has been exhibited.

**6.** In order to substantiate its case, prosecution had examined only two PWs out of ten witnesses named in the charge sheet, namely PW-1, Wosi Ahmad, PW-2, Chandra Bhushan. Side by side also exhibited Ext.-1, Fardbeyan, Ext.-2, Seizure list.

**7.** While assailing the judgment of conviction and sentence, the learned counsel for the appellant submitted that as the PW-2 was hostile to appellant Ram Ekbal Rai and on account thereof, he managed the whole thing under his own leadership otherwise would have informed the Officer-in-charge of Bajpatti P.S. who would have taken care off. It has further been submitted that on account of non-examination of seizure list witnesses as well as non-production of alleged seized 12 bore cartridges, gives another jerk to the prosecution case apart from the fact that there happens to be non-explanation at the end of prosecution on that very score. Furthermore, it has also been argued that mere parrot like statement that assembly was for the purpose of preparation to commit dacoity will not fulfill the



ingredients of Section 399 or 402 of the IPC in light of judicial pronouncement laid down by the Hon'ble Apex Court reported in AIR 1974 SC 778. Something more, which was required to be placed at the end of the prosecution, was identity. Because of the fact that identity has not been properly identified during trial as such, the assemblage as narrated by the prosecution, would not attract Section 399, 402 of the IPC. Hence, the judgment of conviction and sentence rendered by the learned trial court is fit to be set aside.

**8.** At the other end, the learned Additional Public Prosecutor while supporting the finding recorded by the learned lower court submitted that application of Section 399 IPC relates with regard to preparation for commission of dacoity, while Section 402 speaks regarding assemblage for aforesaid purpose. Because, the preparation was going on, on account thereof, identity was uncertain as, it was within the conscious knowledge of the accused where they have to pounce. So, it is submission of the learned Additional Public Prosecutor that once assembly has been duly proved, then in that event, obligation has to be discharged by the accused to explain that assembly was not for the purpose of dacoity.

**9.** Heard both sides as well as gone through the lower court record. Record shows examination of PW-1, Wosi Ahmad as well as PW-2, Chandra Bhushan only both happens to be the police officials. Apart from absence of independent witnesses, there also happens to be absence of other charge sheeted witness.

**10.** After going through the evidence of PW-1 and PW-2 it is apparent that, save and except verbal introduction of that the assembly was for the purpose of preparing to commit dacoity, nothing more has been disclosed.

**11.** As per requirement of Section 399 IPC, wherein preparation for commission of dacoity has been made punishable in the eye of law, there should be positive evidence from the prosecution that dacoity was to be committed in the house of an individual, and for that preparation was going on. In likewise manner, the requirement of Section 402 IPC is, whereunder assemblage has to be properly placed through cogent and reliable evidence, for the purpose of committing dacoity, otherwise the assemblage might be for the purpose of other kind of offence, and for that purpose, they are to be differently dealt with.

**12.** Even taking into account presence of persons will not made it punishable unless it happens to be an unlawful assembly in terms of Section 141 IPC and in case it happens to be, will be punishable under Section 143 IPC, however is not the minor offence of Section 399, 402 IPC.

**13.** Moreover, having some of the member of assembly armed with firearm will not involve the others till it is shown at the end of prosecution that aforesaid event was without conscious knowledge of others. However, present case, as not been properly charged under Section 25(1-A) of the Arms Act goes out of consideration.

**14.** Innocence of accused is the basic fundamental

principle of criminal jurisprudence. Once, the prosecution intends to infringe or wipe out or scratch the aforesaid presumption, then in that event, it is on the prosecution to place cogent material. Even by examining PW-1 and PW-2, the prosecution is found deficient one. Thus, the judgment of conviction and sentence recorded by the learned trial court is set aside. Appeal is allowed. Appellants are on bail, hence are discharged from it liability.

(Aditya Kumar Trivedi, J.)

Patna High Court  
Dated, the 29<sup>th</sup> day of Jan, 2015  
Prakash Narayan

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