

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No. 375 of 2007

Arising Out of PS.Case No. -0 Year- null Thana -null District- Saharsa

1. Gonu Sah @Gannu Sah S/o late Mahali Sah resident of village Bara Bharna, P.S. Bihar District Saharsa.
2. Kopi Mahto S/o late Chathu Mahto.
3. Upendra @Upendra Mahto @Opi Mahto S/o late Chathu Mahto.
4. Hareram Mahto @Harilal Mahto S/o late Paltan Mahto.

Sl. 2 to 4 are resident of village Murli Bharna P.S. Bangaon Dist.-Saharsa.

.... Appellants.

Versus

The State of Bihar

.... Respondent.

Appearance :

For the Appellants : Mr. Pramod Mishra, Advocate.
Mr. Vivek Kumar, Advocate
Mr. Vijay Kumar Mukul, Advocate
Mr. Parmeshwar Mehta, Advocate
Mr. Bindeshwar Prasad Singh, Advocate

For the State :

CORAM: HONOURABLE JUSTICE SMT. ANJANA PRAKASH
and
HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

ORAL JUDGMENT

(Per: HONOURABLE JUSTICE SMT. ANJANA PRAKASH)

Date: 07-01-2016

1. The Appellants have been convicted for the offences under Sections 302/149, 307/149 of the Indian Penal Code and sentenced to rigorous imprisonment for life and 10 years respectively by a judgment dated 19/26.02.2007 by the Additional Sessions Judge, F.T.C. II, Saharsa in S.Tr. Nos. 86, 87, 99 of 1982 and 23, 39 of 1985 arising out Saharsa P.S. Case No. 23 of 1982.

2. The case of the prosecution according to Md. Musay Ali P.W. 11 is that on 16.01.1982 at about 9.30 P.M. while he was lying down in his bed he heard the sound of explosion of bomb at which he woke up and found somebody knocking his door and voices which he identified to be that of one Raijee@Baidyanath Sah, Haleshwa Sah, Satis Sah@Upeshwar, Sitaram Sah, Janardan Sah, Satan Sah, Harilal Sah, Sobhit Sah, Hateshwar Sah Bhagina of Raijee@ Baidyanath Sah, Suraj Sah and Bindeshwari Sah. He then heard some other voice at which being scared he escaped towards east. He noticed that about 50-60 persons were lighting torch and walking and committing dacoity as also entering in the various houses. He heard cries and identified Raijee @ Baidyanath Sah exhorting people to kill all the male persons. He then hid himself and identified 10 persons including Harilal Saw son of Paltan Mahto. After the accused persons fled away committing dacoity and murder, he reached his Tola and found five persons dead and several persons including P.W. 4 Md. Matar Mian, P.W. 5 Md. Hanif Mian, P.W. 12 Md. Gulam Rasul, P.W. 6 Md. Iliyas, P.W. 13 Domi Mian, P.W. 15 Bibi Amna injured, P.W. 16 Bibi Jainab and P.W. 17 Bibi Kamran. They also identified some miscreants. He further stated that the motive of the occurrence was that earlier an incident of burning of the house of Raijee @ Baidyanath Sah had occurred in which they were

suspect and hence he had got this act committed.

3. It is to be noted that none of the Appellants were named in the first information report and the Appellant no. 4 Hareram Mahto @ Harilal Mahto was remanded in the present case as Hari Lal Mahto, a purported miscreant who was a named accused in the first information report.

4. During trial the prosecution examined 23 witnesses.

5. P.W. 1 Safi Ahmad stated that on the night of occurrence at about 12-1 A.M Manki Roy along with his family members came and stated that in Murli Bharna, Baijnath Roy along with his brother and 50-60 other persons had committed dacoity and also assaulted the persons located there. He then along with his cousin brother Nasir and some 2-4 persons went to the village and found 7 dead bodies. However, the accused persons had fled away. He also found a number of injured. He then called a Tractor and sent the injured to Sadar Hospital, Saharsa where Mubarak Mian died on the next day. He does not name any accused persons and his evidence is only on the point of factum of occurrence which is not disputed by the Appellants.

6. P.W. 2 Mukadalli Mian stated that on the date of occurrence at about 8-8.30 P.M while he was sleeping in his house suddenly he heard the sound of explosion of bomb at which he woke



up and saw in torch light 15-16 miscreants were at the door of Mubarak Mian. He names the present four Appellants with specific arms along with the accused named in the first information report. He also alleged specific overt act by some of the accused persons and that subsequently he saw the deceased and the injured persons. He narrates about the motive of the occurrence. His attention was drawn to the earlier statement that he had not stated that Harilal Mahto was armed with Farsa or that Opi Mahto and Kopi Mahto were armed with Chura and Gonu Sah @ Gannu Sah was with lathi who has been identified, in cross-examination. He stated that these four Appellants have no concern with the dispute of Raijee @ Baidyanath Sah. He further stated that he was examined 2-3 days later in the hospital.

7. P.W. 3 Lal Mohammad stated that while he was sleeping in his house on the date of occurrence he heard some sound at which he woke up and identified four Appellants and some others. He himself was injured by Umesh Sah on account of which he became unconscious. His attention was drawn to the earlier statement that he had not stated about Harilal Mahton holding a Farsa or about identification of Appellants Opi Mahto and Kopi Mahto with Chura or Appellant Ganu Sah with lathi. In cross-examination, he stated that Chathu Mahto, the father of the Appellants Kopi Mahto & Opi Mahto was on inimical term with Mubarak Mian, Matar Mian P.W. 4



and Yunus Mian and filed a case in which the father of the Appellants was an informant. He further stated that Harilal Mahto, Opi Mahto and Kopi Mahto belonged to the same village. In cross-examination, he conceded that he was examined 3-4 days later. He offers no explanation as to why he was examined 3-4 days later. He tries to explain as to why he had been examined 3-4 days later by saying that he had become unconscious after the assault.

8. P.W 4 Md. Matar Mian stated that on the night of occurrence while he was sleeping he suddenly woke up by some sound and then in torch light he saw the accused persons Opi Mahto, Kopi Mahto and Harilal Mahto amongst the miscreants. He also saw the assault on his brother Md. Yunus who died on account of such assault. Subsequently he saw the other injured and the deceased. He further stated that at the time the assault was taking place, he was in the field and that 10 persons had entered the house of Md. Yunus. Importantly it was suggested to him that in fact Appellant Harilal Mahto was present at the time of the inquest of the deceased and he signed on the same but he denied such suggestion. It was also suggested that all the Appellants were present at the place of occurrence after the incident and in fact helped the injured but he again denied this suggestion. Even though a number of opportunities was given to him to explain as to when exactly he was examined by



the police, he did not discharge the obligation which is significant since none of the Appellants were named in the first information report and had this witness having seen the complicity of the present Appellants, it was expected that their names would have been disclosed to others or at least to the informant in the 12 hours before recording of the *fard beyan*.

9. P.W. 5 Md. Hanif Mian also stated that while he was sleeping he suddenly woke up on account of assault by Baijnath Sah and others. He identified Baijnath Saw, Fuleshwar Saw, Sita Ram Saw, Janardan Saw, Harilal Saw, Harilal Mahto, Subhash Yadav, Opi Mahto and Kopi Mahto in torch light. He further identified Appellants Harilal, Opi, Kopi and Gannu present in dock. He further stated that on that night seven persons were killed and 13-14 were injured. In cross-examination he conceded that the father of the Appellants Kopi & Opi had filed a case against him of assaulting them in which the brother of Baijnath Sah namely, Janardan was one of the witnesses. On the one hand he says that he emerged only after the accused persons had run away, on the other hand he says that he had identified the persons who had injured him. He also stated that he was not unconscious but was in extreme pain and had remained in the hospital. Even though an opportunity was given to him to explain whether the police had examined anyone in the hospital his answer

was that he did not remember. He stated that he was examined by the police 2-3 days after occurrence.

10. P.W. 6 Iliyas stated that on the night of occurrence he was sleeping with Domi Mian and Umdalli Mian when some miscreants came and started assaulting the villagers on which they woke up. He identified Appellants Gannu Sah, Opi, Kopi and Harilal amongst the culprits. The accused assaulted him. Opi & Kopi had assaulted Domi Mian and Gannu was holding lathi. He further stated that he became unconscious after the occurrence. His attention was also drawn to the earlier statement as to whether he had mentioned that Appellant Kopi Mahto with Chura had assaulted some persons but he stated that he had become unconscious on account of assault and regained conscious only after a day. A definite suggestion was given that in fact Appellant no. 4 was a signatory to the inquest but he denied the same. He stated that the Appellants Opi and Kopi belonged to Murli Bharna village and he was never on inimical term with them.

11. P.W. 7 Md. Samdul stated that on the date of occurrence while he was sleeping with his father he suddenly woke up on the sound of firearms and saw that his father Md. Lal was assaulted by Umesh and Baijnath. He identified Appellant Opi Mahto. He further stated that some other accused had assaulted him

on account of which he became unconscious. He did not identify Appellant Gannu Sah or Harilal. He stated that he had not become unconscious after the occurrence.

12. P.W. 8. Md. Jalil is tendered witness.

13. P.W. 9 Bibi Malo is wife of one of the deceased Md. Yunus. She stated that on the night of the occurrence while she was sleeping along with family members, 5-6 persons entered the house variously armed. She identified Raijee and Sitaram who assaulted her husband and when she went to intervene, she was also assaulted. She immediately became unconscious and regained conscious only after two days. Since she has not named any of the Appellants, we are not discussing her evidence.

14. The next eye witness is P.W 11 Md. Musai Ali the informant who stated that on the night of occurrence he suddenly woke up on account of sound of explosion of bomb so he came out of the house. In torch light, he saw the presence of 50-60 persons and identified the accused persons named in the first information report variously armed. He stated that they entered the houses of Gulam Rasul, Mubarak Mian, Umadalli Mian, Lal Mohammad, Hanif Mian and Yunus Mian and committed dacoity as also assaulted on account of which seven persons died. When the accused persons went away he returned and found Mazid Mian, Ramjan Mian, Taiyab, Zabbar



Mian, Tunnu @ Uzala Mian, Ismail Mian and Yunus Mian dead. Injured Guluma Rasul and Lal Mohammad, Samdul, Bibi Amna, Bibi Palo, Bibi Sabro W/o Sattan, Wife of Atto, Iliyas, Domi Mian Afroz Alam Fakko Mian and Bibi Darudan were sent to the Hospital. In the next morning the police came to the hospital where he recorded his fardbeyan. He claimed to identify the rest of the accused persons by face apart from those whose names had been mentioned in the fard beyan. In cross-examination, he stated that some persons from Bharna came to his village after the occurrence along with tractor out of whom he remembered Sakhi Mohammad and Kamaluddin. He specified that his Tola's people were only inimical term with Baijnath Sah and the accused persons belonged to different Basti.

15. P.W. 12 Md. Gulam Rasul stated that while he shut his door suddenly he heard some voice and in torch light he identified some miscreants Baijnath Sah@Raijee, Umesh Sah, Haleshwar, Sah, Janardan Sah, Sita Ram Rah, Satyanarain Sah, Harilal Saw, Suraj Sah, Sikandar Sah, Appellants Harilala Mahto, Opi Mahto and Subhash Yadav who assaulted several persons. He was assaulted by Baijnath Sah@Raijee and Umesh inflicted sword blow on account of which he became unconscious and regained conscious only after four days. When he became conscious he heard that his son Ramjan Ali and Md. Taiyab had been killed as also Mazeed Mian, Yunus and his



brother had also been killed. He conceded that he was examined 3-4 days after the occurrence. He did not explain as to why the names of the present three Appellants were not mentioned by him earlier. In cross- examination he conceded that there was some kind of enmity between the father of Appellants Opi & Kopi with Mubarak Mian. It was suggested to him that in fact Appellant Harilal was the Sarpach of Murlhi Bharna but he denied the same.

16. P.W. 13 Domi Mian is the next eye-witness. He stated that on the night of occurrence several miscreants came to his Tola and assaulted number of persons of which he identified the present four Appellants. He stated that he was assaulted by Opi Mahto with Chura. He stated that he gave statement four days later to the Investigating Officer.

17. P.W. 14 Md. Afroz Alam also stated that while he was sleeping along with Md. Majeed Mian, the deceased, the miscreants came there and assaulted the deceased out of which he identified the present four Appellants along with others. He stated that he himself was injured and became unconscious and regained consciousness only after 3-4 days.

18. P.W. 15. Bibi Amna wife of Md. Lal stated that while she was sleeping with her two deceased sons, the accused persons came there and started assaulting them on account of which

they died. She identified the present four Appellants. She also stated that she fainted on seeing her sons dead so she could not remember the accused but they had come from outside. From further cross-examination it appears that Appellant Hari Lal was well known to the witness.

19. P.W. 16 Bibi Jainab wife of Md. Matar Mian (P.W 4) stated that in the night of occurrence she identified a number of persons including the present four Appellants. Her attention was drawn to the earlier statement that she had not identified the Appellants Opi, Kopi and Gonu Sah, the reply was that she regained consciousness only after 3-4 days at the Hospital.

20. P.W. 17 Bibi Kamran wife of P.W. 18 stated that on the night of occurrence when she came out of the house she saw the present Appellants along with others. She herself was assaulted by Appellant Harilal on the head after which they looted her house. She became unconscious and regained consciousness only 3-4 days later, where after she gave her statement to the police. Her attention was drawn to the police statement that she had not stated about assault by Appellant Harilal. She further stated that he used to live about 3-4 'laggas' away from her house and their Tola was adjacent to theirs.

21. P.W. 18. Md. Sattan, the husband of P.W. 17 stated likewise about the occurrence and that he had identified the present



four Appellants along with several other named miscreants. He stated that after the occurrence, his father Mubarak died in the Hospital whereas several persons were injured. He also stated that he was examined 3 days after the occurrence and he himself was not injured and in fact had taken the injured to the Hospital on the same night. He also stated that on seeing the assault he had run away towards his field and that Appellant Opi Mahto used to live west of his Tola which comprises of about 40-45 houses and there was no enmity with them. It was specifically asked by him as to who was the inquest witness of his father, to which he denied any knowledge

22. P.W. 22 Md. Tilo stated that he identified Appellants Hari lal and some others and that he is resident of about 3-4 houses away from the house of the Appellant Hari lal. He clarified that Hari Lal was also called by the name Hari Ram Mahto and was not an inquest witness in which Appellant Harilal Mahto was also a witness. He also stated that four Appellants did not have any concern with the affairs of Raijee @ Baidyanath Sah.

23. P.W. 23. Md. Idrish stated that while he was sleeping in his house, he heard the voice of Janardan and Baijnath Rai and identified some accused persons by voice at which he did not go to the place of occurrence. He stated that he saw the Appellants Opi and Kopi near the house. He also stated that on the night of occurrence

the river was full with water up to the chest and Appellants Harilal Mahto, Opi & Kopi were along with him and they had gone to the place of occurrence and also gone to the hospital after the accused persons had fled away.

24. P.W. 10 Dr. J. Lal had held the post-mortem on the dead body of Md. Mazid, Md. Ismail and Md. Ramjan and found death having been caused on account of incised injuries.

25. P.W. 19 Ram Deo Jha held the post-mortem of deceased Md. Yunus, Md. Tayab, Ujala Mian, Mubarak Mian and Zabbar Mian and found their death having been caused on account of incised injuries.

26. P.W. 20 Dr. Sarabgi had examined the P.W. 7 and found the following injuries :

(i) sharp cut injury at the top of the head 6" linear bone deep caused by sharp cutting weapon.

(ii) sharp deep cut on the right side of the neck 2x1/2" linear muscle deep gaping caused by sharp cutting weapon.

Nature : both injuries are grievous.

Age : within 12 hours

These injuries may be caused by sword.

He also examined P.W. 17 Bibi Kamran, P.W. 14. Md. Afroz, P.W. 15 Bibi Amna, P.W. 3 Lal Mohammad, P.W. 12 Md.

Gulam Rasul, P.W. 6. Md. Iliyas , P.W. 13 Domi Mian.

27. The 1st Investigating Officer has not been examined. The 2nd Investigating Officer P.W. 21 Sri Shyam Chandra Jha has recorded his evidence. Ext. 4 is the *fard biyan*. Ext. 2/1 and some other documents are mostly formal in nature. He stated that P.W. 3 had not said that Appellant Harilal Mahto was with Farsa and had merely stated that he was with arms. P.W. 8 had not stated the names of the Appellant, Harilal or that the Appellants Opi, Kopi and Gonu were also with Chura or that he had become unconscious and regained consciousness only 3 days later. P.W. 13 Domi Mian had not stated that he was unconscious for about 4 days. P.W. 14 Md. Afroj had not stated that he was assaulted by Harilal with Farsa and had become unconscious. P.W. 16 Bibi Jainab had not stated the names of Opi Kopi and Gonu. P.W. 17 Bibi Kamran had not stated that Appellant Harilal assaulted on her head with Farsa and nor had taken the names of Opi, Kopi and Gonu Sah. He stated that he had taken over the investigation the very next day and had gone and seen the injured at the hospital and recorded the statements of those who were in a fit condition.

28. The defence also examined 13 witnesses mostly on the point that the Appellants were not amongst the miscreants who had gone to the place of occurrence with tractor etc to help the

injured and had admitted them in Hospital.

29. The most cogent argument raised by the counsel for the Appellants is that even though the Appellants were well known to the witnesses they were not named in the *fard beyan* which by itself is enough to reject the prosecution case on point of complicity of the Appellants. The further submission of the Appellants is that there was no reason for the Appellants to connect with Rajee@Baidyanath Sah who appears to be the main accused in the first information report and therefore, their implication is for reasons which are not wholesome.

30. On the other hand the counsel for the State submits that since eight persons were killed and the Appellants were subsequently named, their Appeal should be dismissed.

31. On a fair discussion of the evidence which we have enumerated above, we find that even though Appellants were well known to all the witnesses who used to reside close by, their names did not find mention in *fard beyan* which was recorded after 12 hours. Their complicity further appears suspicious since all the witnesses have tried to explain the non disclosure of names at the earliest instance by saying that they fell unconscious on account of injuries but the Doctor contradicts such explanation which makes it unbelievable. Moreover the admitted position is that Appellant no. 4

Hareram Mahto @Harilal Mahto was a witness to almost all inquest reports. Also P.W. 23 gives a positive statement that Appellants had visited the house of the deceased after the occurrence and had even gone to the Hospital. Defence witnesses have also stated likewise. The witnesses have also stated that the Appellants were well known to them and had no reason to collaborate with Raijee@Baidyanath Sah, the main accused.

32. For this reason, we are inclined to give benefit of doubt to the Appellants. In the result the impugned Judgment of conviction and Order of sentence dated 19/26.02.2007 passed by the Additional Sessions Judge, F.T.C. II, Saharsa in S.Tr. Nos. 86,87,99 of 1982 and 23,39 of 1985 arising out Saharsa P.S. Case No. 23 of 1982 is hereby set aside. The , Appellants who are in jail custody, is directed to be released forthwith, if not wanted in any other case.

(Anjana Prakash, J)

(Rajendra Kumar Mishra, J)

Prakash/-
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