

IN THE HIGH COURT OF JUDICATURE AT PATNA

Death Reference No.2 of 2016

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In the matter of reference dated 04.03.2016 under Section 374 Cr.P.C. for confirmation of death sentence awarded to the convict in the matter of an appeal under Section 374(2) read with Section 389(1) Cr.P.C. against the Judgment and Order dated 01.03.2016 passed by the 7th Additional Sessions Judge, Muzaffarpur, in Sessions Trial No.750 of 2010.

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The State of Bihar

Versus

.... Petitioner.

Abhijeet Kumar @ Astam

.... Respondent.

with

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Criminal Appeal (DB) No. 259 of 2016

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Abhijit Kumar @ Ashtam @ Astam, son of Subhash Singh, resident of village - Kaharpur, Police Station - Bihpur, in the District of Bhagalpur.

Versus

.... Appellant.

The State of Bihar

.... Respondent.

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Appearance :

{In D. REF. No.2 of 2016 with Criminal Appeal (DB) No.259 of 2016}:

For the Appellant : Mr. Akhileshwar Prasad Singh, Senior Advocate, Mrs. Anita Kumari Singh and Mr. Amrit Anunay, Advocates.

For the State : M/s. A.K. Sinha and S.N. Prasad, A.P.Ps.

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CORAM:HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

And

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA)

Date: 29 -07-2016:

The instant Death Reference and the Criminal Appeal arise out of the Judgment of conviction and Order of sentence dated 01.03.2016 passed by the 7th Additional Sessions Judge, Muzaffarpur, in Sessions Trial

No.750 of 2010, arising out of Sadar P.S. Case No.172 of 2010, holding the sole appellant guilty under Sections 396 and 120B of the Indian Penal Code and Section 27(3) of the Arms Act and awarding the capital punishment of death under Sections 396 and 120B of the Indian Penal Code with fine of Rs.20,000/-, in default of payment of fine, further rigorous imprisonment for one year with observation that there is no need to pass separate order of sentence under Section 27(3) of the Arms Act.

2. The prosecution case, as set out in the fardbeyan(Ext.2) of the Informant Prachi Choudhary (P.W.12) recorded by Sri S.K. Singh, Officer Incharge of Sadar Police Station, Muzaffarpur, at the house of Late Kumar Parivesh of village-Khabra, is that before 12 years, after the death of her father, her brother Kumar Parivesh joined the service of Clerk in Bihar University. At that time, whole family was residing in University Quarter. Before five years, his brother started to construct the house in village-Khabra and after completing the same within one year started residing in that house alongwith his wife, two children and mother. Her brother Kumar Parivesh also used to visit at his native village-Ratwara, P.S. Pear, District-Muzaffarpur, to look after the cultivation work. Today, on 04.07.2010, in the morning at about 08.00 A.M., she received information on mobile phone about the firing at the house of her brother. While she made enquiry that who had received injuries but no proper response was received. She came at the house of her brother in village-Khabra, where she found the crowd at the house. Entering into the house, she found the dead bodies of her brother Kumar Parivesh and nephew Karn Parivesh in the northern room of the

house on bed. In the southern room of the house, the dead body of her sister-in-law Rani Parivesh was lying sustaining bullet injury, where the blood was splattered. On the first floor, in the corner room on the bed, eight years child was also found dead sustaining bullet injury at his neck and on the top of the floor, in the northern corner, carpenter of village-Ratwara was found dead sustaining bullet injury. In the open space, the dead body of her mother Laxmi Rani pooled with blood was also lying sustaining firearm injuries on back and neck. As such, her brother and his family members have been killed by unknown under conspiracy. The neighbours told her that the occurrence took place in between 03.00-04.00A.M. in the morning and at that time, the criminals made indiscriminate firing about half an hour. Criminal have also taken away some articles from the house.

3. On the basis of the aforesaid fardbeyan (Ext.2) of Prachi Choudhary (P.W.12), Muzaffarpur (Sadar) P.S. Case No.172 of 2010 was instituted under Sections 302, 380 and 120B of the Indian Penal Code and Section 27 of the Arms Act against unknown on 04.07.2010. Sri Manish Kumar, Dy. S.P., Headquarter, Muzaffarpur (P.W.16) on investigation submitted the chargesheet against the appellant and two others, namely, Randhir Singh and Dilip Kumar alias Dhiraj.

After taking cognizance of the offence, the case was committed to the court of sessions where charges were framed on 15.07.2011 against three accused including the appellant to face the trial but in course of defence evidence, due to absence of the accused Randhir Singh and Dilip Kumar alias Dhiraj, their bail bonds were cancelled and their trial

was also separated vide order dated 11.09.2015 and, thereafter, the present Appellant has been convicted and sentenced through the impugned Judgment and Order, as indicated above.

4. In course of trial, the prosecution examined altogether 25 witnesses in support of its case whereas the defence examined two witnesses, D.W.1, Asarfi Mahto and D.W.2 Subhash Singh.

5. Out of the 25 prosecution witnesses, P.W.4 Meena Devi and P.W.23 Deependra Bhardwaj have been declared hostile. P.W.5 Shrawan Kumar, P.W.10 Manoj Kumar and P.W.25 Nagesh Nandan are the witnesses of the seizure list regarding the materials as seized at the place of occurrence and are formal in nature. P.W.13 Swyam Prakash, P.W.14 Ram Charitra Mahto and P.W.24 Pramod Kumar, the cousin brother of the deceased Kumar Parivesh, are simply the witnesses of the inquest report. Dharmendra Kumar Raj, who is the A.S.I. of Police of Sadar Police Station, Muzaffarpur, and had brought the material exhibits in the court from Malkhana has been examined twice as P.Ws.21 and 22 and is also formal in nature.

6. P.W.1 Usha Sharma has deposed in her evidence that in the night of 03/04.07.2010 she alongwith her husband Prasoon Kumar (P.W.3) was sleeping in the house. On hearing the sound of firing, they came in fear. The firing continued for about half an hour. Her husband talked on phone to his relative Roshan Kumar Mehta, whose house was situated near her house. In the morning, Roshan Kumar Mehta came to her house and they informed to the police. The occurrence had taken place in the house of

Kumar Parivesh in which six persons including Kumar Parivesh were murdered. The case was lodged on the basis of the statement of the sister of Kumar Parivesh. She has further stated in her cross examination that she had not seen the occurrence.

P.W.3 Prasson Kumar, the husband of P.W.1 Usha Sharma has given similar evidence as that of P.W.1 Usha Sharma.

7. P.W.2 Sudha Mishra has stated in her evidence that the occurrence had taken place at about 03.00 to 04.00 A.M. in the night of 03.07.2010. At that time, she was sleeping in her house alongwith her husband Arun Kumar Mishra P.W.6 and heard the sound of firing. The firing continued for about half an hour. Due to fear, she and her husband did not come out of the house. The occurrence had taken place in the house of Kumar Parivesh, situated in front of her house, in which Kumar Parivesh, his wife Rani, his mother, one boy, total six persons were murdered. In the morning, when none came out from the house, then people gathered there and on information, police came. She has stated in her cross examination that she had not seen the occurrence.

P.W.6 Arun Kumar Mishra, the husband of P.W.2 Sudha Mishra, has given the similar evidence as that of P.W.2 Sudha Mishra.

8. P.W.7 Abhishek Kumar has stated in his evidence that on 03.07.2010, he alongwith his father Ajay Kumar Pandey (P.W.9) had gone to the house of Pariveshji, situated in Mohalla-Khabra and both sat there for sometime. Raniji, the wife of Pariveshji, took them inside and served the meal. At that time, one unknown person after bath came and sat there in

his left side and started to take meal. At that time, the younger son of Pariveshji asked her mother Raniji to take bath, then Raniji in her language made query to that person that in which bathroom there is warm water and that person replied in the same language. He further stated that he entered in the kitchen following Raniji and made query about that person, then she smiling replied that he is her brother in relation. Thereafter, he and his father after taking meal moved from there. He has further stated that, that person was of tall height and had beard. He had gone to jail and identified that person, whose name was Dhiraj and he claimed to identify him in the court also.

P.W.9 Ajay Kumar Pandey, has also stated in his evidence about going to the house of Kumar Parivesh along with his son, Abhishek Kumar (P.W.7) and friend Vibhesh Kumar (P.W.8) one day before the occurrence and staying there about 45 minutes to 1 hour and seeing a boy inside the house who served the tea to them. He also stated that he could not see the face of boy properly. He went in Test Identification Parade but he could not identify the face because he had not seen the face of boy properly at the house of Kumar Parivesh.

9. P.W.8 Vibhesh Kumar has stated in his evidence that he had gone to the village-Khabra alongwith his friend Ajay Kumar Pandey (P.W.9) for searching a room on rent for his son Abhishek Kumar (P.W.7). In that course, he stayed for about an hour at the house of Pariveshji and sat in the room situated beside the sofa room of Varamdah. When he entered into the room of Sofa, one boy with tea came but he did not talk to him.

After some time, he alongwith Ajay Kumar Pandey (P.W.9) and his son (P.W.7) moved from there. The age of that boy was in between 25-28 years. Next day, he came to know that 5-6 persons had been murdered in the house of Pariveshji. When he went there, he found that the dead bodies had been sent for post-mortem examination. He could not know about the assailants. Perhaps, all family members had been murdered. He has further stated that while he had attended the T.I. Parade but could not identify anyone but he claimed to identify that boy in case of his presence in court.

10. P.W.11 Pran Ranjan Choudhary, the brother-in-law of the deceased Kumar Parivesh, has stated in his evidence that the occurrence is of 03.07.2010. On that day, he was at Purnia and in the morning of 04.07.2010, he received information on mobile phone through his wife (P.W.12) about the occurrence and, thereafter, he went to the village-Ratwara, the native village of Kumar Parivesh, where the police recorded his statement. In the said occurrence, Kumar Parivesh, his wife Rani Parivesh, the son of Kumar Parivesh, Laxmi Rani Sinha, the mother of Kumar Parivesh, one carpenter and one servant, total six persons in number, were killed. He further stated that he had participated in their funeral. He has stated in his cross examination that he did not know about the assailants.

11. P.W.12 Prachi Choudhary, who is the informant of the case, has stated in her evidence that she received information on 04.07.2010 regarding the occurrence of firing at the house of her brother Kumar Parivesh through his cousin Pramod Kumar (P.W.24). Thereafter, she



informed to her husband (P.W.11) and she alongwith her maid proceeded for Muzaffarpur from Patna where she saw her brother Kumar Parivesh, his wife, son, mother, one servant and one carpenter having sustained firearm injuries dead regarding which she gave fardbeyan to the police and after reading over the same, she put her signature. She proved the fardbeyan as Ext.2 and her signature on the fardbeyan as Ext.1/2. She stated that in her presence the inquest reports of the dead bodies were prepared and the police prepared the seizure list of the 3-4 mobile sets of the family members. On entering into the house, she saw the ornaments' boxes in a scattered condition, the almirahs of her brother and sister-in-law were found open and the almirah of her mother was found locked. She has further stated that till her stay at the place of occurrence, people were talking but they did not disclose the name of anyone having the hands in the occurrence. After two days of the occurrence when the dead bodies were received then her cousin Madhav (not examined) disclosed that on the preceding date of the occurrence, 2-3 persons were in the house but there is no any trace of them and out of them, one was cousin of his sister-in-law Rani Parivesh and they were talking in the local language of the Mayaka of sister-in-law Rani Parivesh.

12. P.W.15 Dr. Vipin Kumar has deposed in his evidence that on 04.07.2010, he was posted as Tutor in the Department of F.M.T., S.K.M.C.H., Muzaffarpur and on that very day, he alongwith Dr. Mumtaz Ahmad, Professor, F.M.T., S.K.M.C.H., Muzaffarpur, examined the dead bodies of Karn Parivesh, Male, aged about 18 years, of village Khabra, P.S.



Sadar, District-Muzaffarpur, Laxmi Rani, Female, aged about 70 years, wife of Late Devendra Nath Thakur, village-Khabra, P.S. Sadar, District-Muzaffarpur, Kumar Parivesh, aged about 45 years, Male, son of Late D.N. Thakur, village-Khabra, P.S. Sadar, District-Muzaffarpur, an unknown child, aged about 8 years, C/o Late Kumar Parivesh, village-Khabra, P.S. Sadar, District-Chhapra, Subodh Kumar, Male, aged about 30 years, son of Dukha Thakur, village-Ratwara, P.S. Pear, District-Muzaffarpur, Rani Parivesh, Female, aged about 38 years, wife of Kumar Parivesh, village-Khabra, P.S. Sadar, District-Muzaffarpur. He proved the post-mortem reports of the aforesaid six deceased as Exts.4, 4/1, 4/2, 4/3, 4/4 and 4/5 respectively. According to him, the cause of the death of the aforesaid deceased was due to haemorrhage and shock as a result of the injuries found on their persons caused by firearms. There is no need of giving the details of the injuries as found over the dead bodies as death of six persons was homicidal is not in dispute.

13. P.W.16 Manish Kumar has stated in his evidence that on 04.07.2010, he was posted as Deputy Superintendent of Police at Headquarter, Muzaffarpur, and he took the investigation of the case at the place of occurrence on the direction of the Superintendent of Police. In his presence, Sunil Kumar Singh (P.W.19) prepared the inquest reports of the dead bodies and dead bodies were sent for post-mortem examination at S.K.M.C.H., Muzaffarpur. He inspected the place of occurrence minutely. The place of occurrence was village-Khabra within the Police Station Sadar and was semi constructed three storeyed house of the deceased Kumar

Parivesh facing to east. In the north, house of Arun Kumar, south, public road, in the east, vacant land and house of Prasoon Kumar and in the west, house of Professor Prema Devi were situated. In course of inspection of the house, a lock having key was found in the fourth step of the stairs, which disclosed about not using of force in opening the door and the accused were inside the house. On Chowki under the mosquito net, the dead body of Laxmi Devi, was found on the ground floor in room whereas the dead bodies of Kumar Parivesh and his son were found in another room on bed under the mosquito net pooled with blood. On the first floor, the dead body of 8 years child pooled with blood was found and on second storey, the dead body of Carpenter Subodh Thakur pooled with blood was found, the dead body of Rani Parivesh was also found on that floor on the bed. Below the stairs, the un-cleaned plates were found. On inspection, the blood stained at Sofa Set cover, fired cartridges, S.B.I. Pass-book, some photographs of passport size etc. were found. On bed, the blood stained over the bed-sheet and pillow set was found and one mobile set was also found over the bed. In the second room near stairs, key and lock were found and in the dining hall, live cartridge was found. S.I. Sunil Kumar Singh prepared the seizure list of the aforesaid materials. Thereafter, he recorded the statements of Ram Charitra Mahto (P.W.14), Swayam Prakash (P.W.13), Shambhu Thakur (P.W.20), Pramod Kumar (P.W.24), Birendra Kumar (not examined), Nagesh Nandan Rai (P.W.25), Manoj Kumar (P.W.10), Shrawan Kumar (P.W.5), Arun Kumar Mishra (P.W.6), Sudha Mishra (P.W.2), Prasoon Kumar (P.W.3), Usha Sharma (P.W.1) and Meena



Devi (P.W.4) and the restatement of Prachi Choudhary, the informant (P.W.12). He also recorded the statement of Pran Ranjan Choudhary (P.W.11), Sri Prakash Singh (not examined), Pawan Kumar (not examined), Satyendra Kumar Thakur (not examined). The witnesses, Meena Devi (P.W.4), Abhishek Kumar (P.W.7), Shambhu Thakur (P.W.20) and Vibhesh Kumar (P.W.8) had detailed the physique of the culprits stating that they used to talk in the language of Mayaka village of Rni Parivesh and on that very basis, the sketch of the faces of the culprits were got prepared. Later on, the information was received to the effect that two persons having similar faces of sketch prepared were seen visiting at the house of Kumar Parivesh. After getting criminal history, three suspects, namely, Abhijeet Kumar alias Astam (appellant), Randhir Singh and Dilip Kumar alias Dhiraj were taken into custody for interrogation. Abhijeet Kumar alias Astam (appellant) and Randhir Singh confessed their guilt and their confessional statements were recorded by S.I. Baleshwar Prasad and S.I. Sunil Kumar Singh (P.W.19). After taking the permission of the court, Test Identification Parade was arranged in which both were identified by the witnesses. On completion of investigation, he submitted the chargesheet against Abhijeet Kumar alias Astam (appellant), Randhir Singh and Dilip Kumar alias Dhiraj under Sections 396 and 120(B) of the Indian Penal Code, continuing the further investigation against the other accused.

14. P.W.17 Rajiv Kumar Bharti has stated in his evidence that on 05.10.2010, he was posted as Judicial Magistrate, First Cass, Muzaffarpur and in his presence, Test Identification Parade was arranged in

which P.W.7 Abhishek Kumar (P.W.7) identified the suspect Dilip Kumar alias Dhiraj whereas Shambhu Thakur (P.W.20) identified the suspect Abhijeet Kumar alias Astam (appellant).

15. P.W.18 Baleshwar Prasad, who was posted as Officer Incharge at Police Station-Kazi Mohammadpur at the time of the occurrence, has stated that he was instructed by the Superintendent of Police, Muzaffarpur, to cooperate in the investigation of Sadar P.S. Case No.172 of 2010 and in that course, he recorded the confessional statement of the accused Randhir Singh, son of Raghunandan Singh. He proved the confessional statement of the aforesaid accused as Ext.6 with objection.

16. P.W.19 Sunil Kumar Singh has stated in his evidence that on 04.07.2010, he was posted as Officer Incharge at Sadar Police Station, Muzaffarpur and on his instruction, the fardbeyan of the informant Prachi Choudhary (P.W.12) was recorded by A.S.I. Suresh Mishra and he proved the signature of Suresh Mishra as Ext.2/2 and also the First Information Report as Ext.7. He further stated that on that very day, he prepared the inquest reports of the dead bodies of the deceased Kumar Parivesh, unknown male child aged about 8 years, Subodh Thakur, Rani Parivesh, Laxmi Rani and Karn Parivesh and also seized the materials from the place of the occurrence. He further stated that on 21st July, 2010, he recorded the confessional statement of Abhijeet Kumar alias Astam (appellant) and he proved the same as Ext.6/1.

17. P.W.20 Shambhu Prasad Thakur has stated in his evidence that he received information about the occurrence in the morning of

04.07.2010 and he came to the house of Parivesh at Khabra where he saw the dead bodies of Laxmi Rani, Kumar Parivesh, Rani Parivesh, Karn Parivesh, Carpenter Subodh and one boy. In his presence, the inquest reports of the dead bodies were prepared. He and Pramod Kumar put their signatures on the inquest report of the deceased Laxmi Rani and he proved his signature and that of Pramod Kumar on the same as Exts.3/16 and 3/17. He further stated that on 02.07.2010 in the evening, he alongwith his son Madhav Kumar (not examined), had gone to the house of Parivesh with sweet in pleasure as his son Madhav Kumar had qualified the Polytechnic Examination. Kumar Parivesh was the son of his cousin, at that time, he was lying on the bed where two boys were sitting. When he reached there, both boys moved towards inside the house. He had not seen those boys earlier. On query, Kumar Parivesh told him that he did not know those boys but they belong to village-Samarya, the sasural place of his brother-in-law. During stay there, both boys remained inside the house. He had disclosed the age of both boys, due to that reason, he was approached to attend the Test Identification Parade and in Test Identification Parade, he identified one but he did not know the name of that person, and, later on, he came to know that, that person was Abhijeet Kumar alias Astam (appellant). On seeing the accused Abhijeet Kumar alias Astam in court, this witness has stated that he had identified him by the image but he is not to sure. He further stated that Vibhesh Kumar (P.W.8) and Abhishek Kumar (P.W.7) had also attended the Test Identification Parade. He also stated that he had seen both boys at the house of Parivesh for one and half minutes and both

boys had remained inside the house and due to that reason, he could not see them properly. He had not claimed to identify the accused in his statement recorded by the police. He further stated that he had not disclosed the physique of the culprits to anyone.

18. On consideration of the evidence of the witnesses, as discussed above, it is apparent that they are not eye witnesses to the occurrence. P.W.12, Prachi Choudhary, who is the informant of the case and the sister of the deceased Kumar Parivesh, has stated in her evidence that after two days of the occurrence when the dead bodies of the deceased were received after post-mortem examination, her cousin Madho (not examined) disclosed that on the preceding date of the occurrence, i.e., 03.07.2010, three persons were in the house, but there is no trace of them, he also disclosed that one was cousin of Rani Parivesh and they were talking in the local language of Mayaka of Rani Parivesh. P.W.16 Manish Kumar, who is the Investigating Officer of the case, has stated that in course of investigation, Meena Kumari (P.W.4), Abhishek Kumar (P.W.7), Shambhu Thakur (P.W.20), Vibhesh Kumar (P.W.8) had detailed the physique of the culprits and on that very basis, sketch of the faces of the culprits were got prepared and on that very basis, Abhijeet Kumar alias Astam (appellant), Randhir Singh and Dilip Kumar alias Dhiraj were apprehended by the police and they were put on T.I. Parade. P.W.7 Abhishek Kumar has stated in his evidence about his visit at the house of the deceased Parivesh Kumar alongwith his father Ajay Kumar Pandey (P.W.9), where one boy was seen serving the tea, who had also taken the

meal with him and on query, Raniji replied that, that boy is her brother in relation. This witness has identified the accused Dilip Kumar alias Dhiraj in the Test Identification Parade and claimed to identify him in course of his evidence. P.W.9 Ajay Kumar Pandey has deposed in his evidence that he along with his son Abhishek (P.W.7) and friend Vibhesh (P.W.8) had gone one day before the occurrence in day at the house of Kumar Parivesh where one boy was present and served the tea but he could not identify the face properly and he also not identified any accused including the Appellant in Test Identification Parade while he identified the accused Dilip Kumar @ Dhiraj on the basis of physique. P.W.20 Shambhu Prasad Thakur has stated in his evidence that on 02.07.2010, i.e., two days prior to the occurrence, in the evening he had gone alongwith his son Madhav (not examined) to the house of Kumar Parivesh with sweet to celebrate as his son Madhav Kumar had qualified the Polytechnic Examination and at that time, two boys were sitting with Kumar Parivesh and on query, Kumar Parivesh disclosed that he did not know those boys but they belonged to village-Samarya, sasural village of his brother-in-law. During his stay there, both boys remained inside, due to that reason, he could not see them properly. However, this witness identified the appellant in Test Identification Parade but in court on seeing the accused-appellant, he stated that he had identified him by image but is not too sure about it. As such, P.W.20, Shambhu Prasad Thakur could not identify the appellant in court properly. The identification of the appellant only by P.W.20 Shambhu Prasad Thakur in court is doubtful and there is no other evidence/material to show the complicity of the appellant

with offence.

19. Under the facts and circumstances of the case and the evidence, as discussed above, I find that the prosecution has not been able to prove its case against the appellant beyond all reasonable doubts.

In the result, the reference is answered in negative and the appeal is allowed. The impugned Judgment of conviction and Order of sentence is set aside. The Appellant is directed to be released forthwith, if not wanted in any other case.

(Rajendra Kumar Mishra, J)

Samarendra Pratap Singh,J: I agree

(Samarendra Pratap Singh, J)

Pradeep Srivastava.

AFR/NAFR	NAFR
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