

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.482 of 2011

[Against the Judgment of conviction dated 18th day of April, 2011 and order of sentence dated 20th April, 2011 passed by the 1st Additional Sessions Judge, Katihar, in Sessions Trial No. 12 of 2009 arising out of Katihar (Jogbani) Rail P.S. Case No. 105 of 2008, G.R. Case No. 128 of 2008]

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Basant Choudhary, S/O Mahesh Kant Choudhary, R/O Vill-Baidyanathpur, P.S.- Rosra, Distt-Samastipur, at present residing at Dharmshala Road, Jogbani, P.S.- Jogbani, Distt-Araria

.... Appellant/s

Versus

The State Of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ajay Kumar Thakur, Adv.
Mr. Radha Mohan Singh, Adv.
Mr. Dilip Kumar, Adv.

For the State : Mr. D.K. Sinha, Additional P.P.

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CORAM: HONOURABLE JUSTICE SMT. ANJANA PRAKASH

and

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

ORAL JUDGMENT

(Per: **HONOURABLE JUSTICE SMT. ANJANA PRAKASH**)

Date: 27-06-2016

Heard learned counsel for the Appellants and learned counsel appearing on behalf of the Public Prosecutor.

2. The Appellant has been convicted to undergo imprisonment for life under Section 302 Indian Penal Code with a fine of Rs.5,000/- payable to the family of the deceased namely, late Md. Majlum and late Manoj Rai in equal proportion i.e. Rs.2,500/- each and in default of which further one year simple imprisonment, rigorous imprisonment for ten years under Section 394 Indian Penal



Code and a fine of Rs.2,000/- in default of which further six year imprisonment, rigorous imprisonment for three years under Section 411 Indian Penal Code and rigorous imprisonment for seven years under Section 25(1-B)(A), 26 and 27 of the Arms Act passed by the Additional Sessions Judge, Katihar, in Sessions Trial No. 12 of 2009 arising out of Katihar (Jogbani) Rail P.S. Case No. 105 of 2008, G.R. Case No. 128 of 2008.

3. The case of the Informant Hirday Prasad who was posted at the Rail Police Station, Jogbani, is that on 15.10.2008 suddenly they heard sounds of firing from the retiring room, so, they rushed there and saw one accused running away armed with a Pistol and a bag. He was wearing a blue shirt and a full pant. He was chased but in retaliation he fired, on account of which, two persons lost their lives. Subsequently, the said accused persons who had been chased and had changed into a Lungi and Ganji, was caught with a Pistol and a purple bag. He explained the purchase of pistol and cartridges from a certain seller.

4. During Trial, the Prosecution examined 28 witnesses whereas the defence examined five witnesses mainly on the point of the Appellant had been arrested on suspicion from his house.

5. PW 1 (Md. Jatin), PW 24 (Radha Krishna Maharaj) and PW 26 (Vijay Kumar Thakur), corroborated the factum



of occurrence but did not identify the Appellant. PW 15 (Ranjeet Singh Yadav), PW 16 (Vijay Kumar Singh), PW 17 (Vinod Kumar), PW 18 (Dharmendra Kumar), PW 19 (Satendra Prasad), PW 21 (Ramadhar Paswan), PW 22 (Hridya Prasad), Informant, PW 27 (Sanjay Kumar Jaiswal) and PW 28 (Himanshu Pandey) corroborated the factum of occurrence as also identified the Appellant as being the miscreant who has caused the death of two persons. PW 3 (Shital Prasad Chaudhary), PW 4 (Madhurendra Pandey), PW 5 (Nakul Poddar), PW 6 (Ashok Kr. Poddar), PW 7 (Md. Ishrafil), PW 8 (Ram Chandra Sharma), PW 9 (Anand Kr. Sah), PW 10 (Rajesh Kumar) and PW 12 Srikant Ojha, did not support the case of the Prosecution and were declared hostile. PW 11 (Ainul Haque) is a formal witness on point of inquest and seizure whereas PW 13 (Dr. Bimal Kant Choudhry) is also formal, being an observer of the postmortem examination report of the two deceased which was prepared by PW 14 (Dr. Om Prakash Singh). PW 20 (Rajiv Kumar) and PW 25 (Gore Lal Tiwari) are Tendered witnesses.

6. PW 1 (Md. Jatin) stated that on the date of occurrence, two persons had been killed by a fleeing accused but he had not seen the apprehension of the accused.

7. PW 2 (Md. Bhadai) also stated that while he was standing next to the Station, he saw several persons chasing the

accused who had fired at two persons and was running away. Everyone ran to catch him and he identified the Appellant as the person who was seen running away. He does not talk about the apprehension of the Appellant. This witness was resident of the place of occurrence itself where the Appellant is residing but he does not name the Appellant and merely identified him in Court.

8. PW 15 (Ranjit Singh Yadav) stated that he was standing at the tea shop outside Jogbani Railway Station when he heard that somebody had shot at a person a dealer in exchanging currency and the Police and others were chasing him. In course of the same, Ram Ishwar, Constable, sustained a firearm injury on his chest. He was then removed to Virat Nagar Hospital. He identified the Appellant as the person who had fired at the Constable. He stated that about 50 persons were before him in chasing the accused and he was the colleague of Constable Ram Ishwar and was 20 meters behind him when he sustained the injury. He himself was examined about 3-4 days later. He stated that Manoj Rai, the deceased used to exchange foreign currency. From his evidence, we find that he has conceded that he was at least 20 Meters behind the Constable who had sustained the injury, in which circumstances the story of identification of the Appellant having shot at the Constable, appears highly improbable.

9. PW 16 (Vijay Kumar Singh) another Constable of



Jogbani Rail Police Station stated that on hearing two gun shots, he went and saw the deceased Manoj Rai dead and one person running away. When Constable Ram Ishwar tried to catch him, he fired at Ram Ishwar, due to which, he fell down. He stated specifically that the accused was wearing a Pant Shirt and when he was chased, he hid himself in a house situated at Dharamshala Mohalla from where he was arrested merely in an underwear. He identified the Appellant as saying that he was the person who had fired at the Constable and caught nearby. He also conceded that at least 50 persons were chasing the accused and he was about 15-20 meters away and it was the first time that he had seen the accused. He concedes that no Pistol was recovered from his possession nor was he a seizure list witness.

We thus find from his evidence as well that he was at quite a distance from the place where the Appellant is said to have shot at the Constable and his case is materially different from the Informant when he says the Appellant was arrested in an underwear only.

10. PW 17 (Vinod Kumar) is another Constable of the Jogbani Railway Police Station who confirmed about the murder of Manoj Rai and one accused being chased by several persons. In course of the same, the accused fired at the Constable Ram Ishwar Yadav. Thereafter, the accused was caught from the house of Raju



Poddar from Dharamshala Road when he was surrounded and from his possession, Pistol, Cartridges and a purple bag were recovered. He also stated that about 100-200 persons were chasing the accused and the accused was about 15-20 yards ahead from the rest PW 18 (Dharmendra Kumar) and PW 19 (Satender Kumar) had entered the house of Raju Poddar. He stated that the accused locked the door from inside and he came out with his Pistol and the bag of money upon which he was arrested. Seizure list was duly prepared of the articles.

11. PW 18 (Dharmendra Kumar) was also a Constable of the RPF Force, Jogbani, and had chased the accused, in course of which, Constable Ram Ishwar Yadav sustained firearm injuries. He stated that one old man had also sustained firearm injury in this transaction. The accused allegedly entered the house located at Dharmashala Road and then he was arrested from the Lavatory of Raju Poddar and from his possession, a firearm and one bag were recovered which was blood stained. Seizure list was prepared which was handed over to the accused as well. He identified the Appellant as the person who committed the crime.

In cross-examination, he asserted that the accused were wearing Pant-Shirt when he was running away and he had not seen him entering the house of Raju Poddar. He was pulled out from there, by which time he was wearing Lungi-Ganji and had a Jhola in his

hand as also a Pistol.

12. PW 19 (Satendra Prasad) is another Constable of Jogbani Rail Police Station also corroborates the factum of occurrence and the murder of the two deceased. He stated that the Appellant had been caught with a bag and a pistol and the Police brought him. He identified the Appellant in dock.

In cross-examination, he asserted that the accused were wearing Pant-Shirt at the time when he was running away and when he was arrested, he was wearing Lungi-Ganji. However, no seizure list was prepared in his presence.

13. PW 21 (Ramadhar Paswan) is also on the point that an accused was being chased when he fired at the two deceased after which he was arrested. He identified the Appellant in Court. He corroborated that at least 50 persons were chasing the accused and the accused was at the distance of about 10 yards from him. Surprisingly, he also stated that he was never examined by the Police earlier which renders his evidence first time in Court irrelevant.

14. PW 33 (Hirday Prasad) is the Informant, who corroborated the factum of having heard gun shot after which they found Manoj Rai injured after which the entire Police Force chased the accused persons and then that person was caught from the lavatory of Raju Poddar where he was hiding. He stated that on their calls to



surrender, the accused came out with his bag and Pistol and then he was arrested. He identified the Appellant as the person who was wearing Lungi-Ganji and a bag was hung in his hand. He prepared the seizure list in front of independent witnesses. He does not prove the same. He mentions about having given written information which is Ext. 6 and the Seizure list of firearms which is Ext. 7 and some documents Ext. 8. He stated that none of them saw the accused running inside the house and did not know as to who disclosed the accused entering in the house of Raju Poddar. He further stated that the accused came out raising his hands armed with Pistol and bag. He was wearing Lungi-Ganji. He conceded that the accused used to belong in the same locality. It was suggested to him that he caught a wrong person which he denied. However, he identified the Appellant.

15. PW 27 (Sanjay Kumar Jaiswal) was posted at Jogbani Rail Police Station and he had heard two sounds of firing at which he learnt that two persons had been shot dead. He did not identify the Appellant in Court.

16. PW 28 (Himanshu Pandey) is the Investigating Officer who stated that he reached the place of occurrence and found one person Manoj Rai dead and Rameshwar Prasad injured. He prepared the inquest report which is marked Exts. 2/2 and 2/3. He further stated that the Informant and the rest of the Police Force

produced the Appellant along with a bag and a Pistol, of which he prepared a seizure list which is Ext. 6/1. The First Information Report he proves as Ext. 9. He then inspected the place of occurrence and prepared the seizure list of articles. It is on the pointing out of the Appellant, from a ditch nearby, a blue trouser and a light colour shirt was recovered of which a seizure list was prepared which is Ext. 1/1. He got the signature of two witnesses namely, Nakul Poddar and Ashok Poddar on the said seizure list. He also seized a blood stained towel and empty cartridges and Pistol from the possession of the Appellant which was seized. He proves the seizure list and blood stained earth as Ext. 12. The accused was then sent to the Hospital for treatment and check up.

In cross examination he describes the topography having made a sketch of the same which is Ext. 13 and the Arms test report (Ext. 14). He stated that he had not brought the seized articles to the Court nor was the money produced.

17. The Prosecution also examined PW 14 (Dr. Om Prakash Singh) who proves the postmortem examination report of the two deceased namely, Manoj Rai and Md. Majlum, as Ext. 5 series. He found the following injuries on their person:

External injuries found on the dead body of the deceased Manoj Rai

“(i) An oval penetration

wound about 2 mm size on the alae of the nose. Wound around the charge.

(ii) Lacerated wound about 5 mm in size on the middle of the occipital region with brain material coming out. On dissection – Opening the cranial cavity scalp bone fractured and brain matter lacerated and blood clot found. Opening the thoracic and abdominal cavity corresponding intact in c-ii. Time elapsed since death within 48 hrs. Death in our opinion due to haemorrhage and shock as result of above mentioned injury.

External injuries found on the dead body of the deceased Md. Majlum

(i) A small round wound about 2 mm radius just above the right nipple over the chest wound with charge.

(ii) A small round wound about 3 and ½ mm in radius just below the right angle of scapula.

On dissection – On opening the cranial cavity NAD. On opening the thoracic cavity lungs full of blood large vessels damaged. On opening the abdomen cavity corresponding viscera are intact and in c-ii. Time elapsed since death within 48 hours. Death in my opinion due to haemorrhage and shock. As a result of above mentioned fire arm injury.”

18. The Defence witnesses have stated on the point that the Appellant belong to the said area and was caught on wrong identification but, we find that none of them were examined by the Police nor did they give any petition to any authority in its regard.

19. The learned counsel for the Appellant submits that



the Prosecution case appears improbable inasmuch as it is unbelievable that the Appellant would be still holding the arms and bag of money after the chase. Fact of arrest from his own locality suggests it to be a case of misidentification. The further submission is that most of the witnesses, who were independent, have turned hostile and, therefore, no reliance be placed on the Prosecution case which is now based mainly on official witnesses.

20. Even if we discredit the evidence of Prosecution on the point of apprehension of the Appellant with Arms and bag of money, fact remains that the witnesses have consistently stated that it was the Appellant who had shot and killed the two deceased. We also find that the Appellant was caught soon thereafter hiding in a room and it was on his statement that the trouser and shirt were recovered from a place nearby. In such circumstances, even if the Prosecution has failed to prove the charge of the Appellant having been in possession of the arms or the looted money, it has well proved that the Appellant was the person who had fatally shot dead the two deceased after committing robbery.

21. In view of such, we maintain the conviction of the Appellant under Section 302 Indian Penal Code. He is further convicted under Section 27 of the Arms Act and sentenced to rigorous imprisonment for 7 years under Section 394 Indian Penal Code and

sentenced to rigorous imprisonment for 10 years.

22. In the result, the Appeal is dismissed with aforesaid modification in conviction.

(Anjana Prakash, J)

(Rajendra Kumar Mishra, J)

S.Ali/-

AFR/NAFR	NAFR
CAV DATE	N/A.
Uploading Date	15/07/2016
Transmission Date	15/07/2016