

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.76 of 2015

Arising Out of PS. Case No.-262 Year-2007 Thana- NATHNAGAR District- Bhagalpur

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1. Bateshwar Mandal Son of Late Kesho Mandal @ Kishto Mandal @ Ketho Mandal
 2. Bangata Mandal Son of Late Garbhu Mandal Both residents of Bairiya Bind Tola, P.S. - Nathnagar, District - Bhagalpur.
 3. Pairu Mandal Son of Girdhari Mandal Resident of Village - Jamalpur, P.S. - Bihpur, District – Bhagalpur.

... .. Appellant/s

Versus

The State of Bihar

MANDAL

... .. Respondent/s

Criminal Appeal (DB) No. 196 of 2015

Arising Out of PS. Case No.-262 Year-2007 Thana- NATHNAGAR District- Bhagalpur

Bablu Mandal Son of Late Mahabir Mandal resident of Ajmeripur Diyara, Police Station- Nath Nagar, District- Bhagalpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Criminal Appeal (DB) No. 940 of 2014

Arising Out of PS. Case No.-262 Year-2007 Thana- NATHNAGAR District- Bhagalpur

Nagay Mandal S/o Keso Mandal Resident of Village Beria, P.S. Nathnagar, District Bhagalpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In Criminal Appeal (DB) No. 76 of 2015)

For the Appellant/s : Mr. Ranjan Kumar Jha

Mr. Rana Pratap Singh

for the State Mr. S.N.Prasad, APP

(In Criminal Appeal (DB) No. 196 of 2015)

For the Appellant/s : Mr. Indeshwari Prasad Mandal



For the State	Mr. S.N.Prasad, APP
(In Criminal Appeal (DB) No. 940 of 2014)	
For the Appellant/s :	Mr. Ramakant Sharma, Sr. Advocate
	Mr. L.K.Sharma
	Mr. Prem Shankar Kumar
For the State	Mr. S.N.Prasad, APP

CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL

And

**HONOURABLE MR. JUSTICE MADHURESH PRASAD
CAV JUDGMENT**

(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)

Date : 18-10-2017

For the sake of convenience, the appellant Bateshwar Mandal, Bangata Mandal, Pairu Mandal of Cr. Appeal (DB) No.76 of 2015, Bablu Mandal of Cr. Appeal (DB) No. 196 of 2015 and Nagay Mandal of Cr. Appeal (DB) No. 940 of 2014 shall hereinafter be referred as A-1, A-2, A-3, A-4 A-5 respectively.

2. A-2 and A-5 have been convicted under sections 302/148 IPC as well as under section 27 of the Arms Act whereas A-1, A-3 and A-4 have been held guilty under sections 302/149 and 148 IPC. The sentence recorded under section 302 IPC or section 302/149 IPC is R.I. for life with fine having default clause. Separate sentence was also inflicted on the appellant under section 144 8 IPC and section 27 of the Arms Act.

3. Taking exception to the judgment of conviction dated 20.11.2014 and order of sentence dated 22.11.2014



passed in S.T. Nos. 361/08, 819/08 and 1002/09 which were heard analogously by the Additional Sessions Judge-VI, Bhagalpur, the present set of appeals have been filed.

4. Nageshwar Mahto (P.W.7) lodged the Fardbayan (Ext.2) on 01.11.2007 at 6.45 A.M. at the site of the occurrence recorded by S.B.Roy Sub-Inspector, Nathnagar alleging that on 31.10.2007 at about 9.00 P.M. he was present at the 'chabutra' of the house along with the two deceaseds and other family members which includes some of the witnesses. Suddenly, 9-10- accused persons emerged from the north-west side armed with weapons, started searching the person of P.W. 2. Having ascertained that he did not possess fire-arm, it is alleged that co-accused Sudhir Mandal fired at Deepiya Devi, mother of P.W.2 and 6 which hit her right waist as a result whereof she died on the spot. In the meanwhile, A-2 and A-5 shot from their respective fire-arms at Yogendra Mahto, the father of P.Ws 2 and 6 which hit on his chest and stomach. He, too, fell down and died on the spot. The accused persons retreated from the place of occurrence opening fires. The informant who is the own brother of the deceased Yogendra Mahto escaped from the place of occurrence and went to the village Dildarpur situated about 03 kilometers away from the place



of concurrence. Information was given to the police whereafter the police arrived and the Fardbayan was lodged which was witnessed by P.W.6. The motive for the occurrence assigned is a quarrel which had ensued between the daughter of the two deceaseds namely P.W.1 and the daughter of Nagay Mandal (A-5). The land dispute between the parties was also assigned as another reason. The I.O. of this case is P.W.8. He was accompanying Sri S.B.Roy. After recording the Fardbayan the inquest proceedings over the two dead bodies were carried out in presence of P.W. 5. The dead bodies were dispatched for the post mortem examination. P.W.9 Dr. Arun Kumar Singh was then posted as Associate Professor at Jawaharlal Nehru Medical College & Hospital, Bhagalpur. On 01.11.2007, at 2.00 P.M. he held/conducted the autopsy on the dead bodies of the deceased Yogendra Mahto @ Jogi (hereinafter to be referred to as 'D-1) and Deepya Devi (hereinafter to be referred to as 'D-2). The post mortem report(s) of D-1 and D-2 are placed on record as Exts-5 and 6 respectively. As noted above, P.W. 8 later took up the investigation and on conclusion thereof, led the charge-sheet(s) in stages. Records indicate that 03 charge-sheets were filed. To put the records straight, it may be noted that the trial of the co-accused Sudhir Mandal (S.T. No. 715 of



2012) was later separated and the remaining three trials held analogously.

5. With a view to bring home the charges, the prosecution examined 09 P.Ws. Brief resume of the witnesses are as follows:-

6. P.W. 1 Soni Kumari @ Sukhri Kumari was then aged about 13-14 years. She has deposed as an eye witness to the occurrence. P.W. 2 and P.W. 6 are full brothers being sons of D-1 and D-2. Both of them have deposed as eye witnesses to the occurrence. P.W. 3 Sujan Mahto and P.W. 4 Nanku Mahto are the co-villagers who took the dock to support the prosecution case. However, the prosecution did not rely on them and they were declared hostile at the request of the prosecution. P.W. 5 Ram Ekbal Mahto is the witness to the inquest report(s). P.W. 7 is the uncle of P.Ws 1,2 and 6 and the informant of the case. He narrated the case as an eye-witness to the occurrence. P.W.8 Sudhir Kumar Thakur took up the investigation after recording of the Fardbayan and submitted the charge sheet(s). P.W. 9 Dr. Arun Kumar Singh is the autopsy surgeon who held the autopsy on the two dead-bodies and proved the post mortem reports (Exts. 5 and 6).

7. The defence of the appellants was complete denial of



their involvement in the case. A plea was taken which finds support from the evidence on record that there was hostility between both the parties from before. The own brother of co-accused Sudhir Mandal was killed in which the son of the informant (P.W.7) was an accused. The appellants were the witnesses in the said murder case. P.W.7 (informant) has accepted in his deposition. Awadhesh was accused in the murder case of son of co-accused Sudhir Mandal.

8. In consideration of the evidence on record, the learned trial court, placing reliance on the evidence of P.Ws 1,2, 6 and 7, in the light of the post mortem report(s) (Exts.5 and 6), held the charges proved beyond the shadow of reasonable doubts and convicted the appellants.

9. We have heard Mr. Ramakant Sharma, Senior Counsel who made the lead submission(s) on behalf of the appellants and Mr. S.N.Prasad, APP for the State.

10. While criticizing the judgment, the counsel for the appellants submitted that the prosecution case is shrouded in mystery on several counts. The informant, indisputably, was not the resident of the village where the occurrence had taken place. He was living separately in village Dildarpur nearly three kilometers away. He, however, has claimed his presence



in the village on the relevant night. If his evidence is scrutinized deeply, it shall appear that he was not present at the place of occurrence. The initial version of the prosecution case, according to the informant(P.W.7), was narrated and recorded by the police at about 11.00 P.M. on the date of occurrence. The FIR (Ext.2) however, indicates that the first version of the prosecution case was made by him on 1st of November, 2007 at 6.45 A.M. in the morning. In this connection, he drew our attention to the evidence of P.Ws 2 and 6 who have stated in no uncertain terms that the informant was not present at the scene of occurrence. He was later called. It is next submitted that the objective finding of the doctor in the post mortem report(s) do not support the manner of occurrence as spelt out by the witnesses. With regard to the motive for false implication, he pointed out that P.W.7, in his cross-examination, has admitted that his son was facing the prosecution in the murder case of murder of own brother of co-accused Sudhir Mandal. Criticizing the evidence of P.W.1, he would argue that she being the child witness, there was every possibility of her being tutored, particularly when P.W.1 in her cross examination has accepted that her statement was not previously recorded and that for the first time she was deposing in court. The



remaining evidence of P.Ws 2 and 6 have also been criticized on several counts. In the submission of the counsel for the appellant, P.Ws 2,6 and 7 are wholly unreliable witnesses. In support of his submission, he relied on **AIR 76 SC 989 (Muluwa vs. State of M.P.)** and a division bench judgment of this Court since reported in **2017 (3) PLJR 377 (Ramanand Singh vs. State of Bihar)**.

11. learned APP, in contra, supported the finding(s) of guilt recorded under the impugned judgment against the appellants. He submits that the evidence(s) of P.Ws 2, 6 and 7 fully support the prosecution case in respect of time of occurrence, place of occurrence, the manner of occurrence and the complicity of the appellants in the crime. Their presence at the scene of occurrence was natural.

12. We considered the rival submissions and perused the evidence on record.

13. The Fardbayan (Ext.2) was recorded on the statement of P.W.7 (informant) which also bears the LTI of P.W.6. For this reason, both P.W. 7(informant) and P.W.6 claimed themselves as the informant of the case. The Fardbayan was recorded at the village Bairya Bandal Bind Toli on 01.11.2007 at 06.45 hours which is the place of residence of the deceased(s). Since the



appellants have raised a serious question on the first version of the prosecution case recorded by the police, we have examined the evidence of P.W.7. According to P.W.7, after having witnessed the ghastly murders of his brother (D-1) and Bhabhi (D-2) he ran 03 kilometers to reach his village and thereafter made phone calls to the police and gathered the co-villagers. By 10.30 P.M. in the same night he again came back to the place of occurrence when the police had also arrived and he made the Fardbayan which was recorded by the S.I. of Nathnagar police station at about 11.00 P.M. which also bore the signature/LTI of P.W. 6. Immediately thereafter, the inquest proceedings were carried out and the dead bodies were taken to the hospital by the police in the same night for the post mortem examination(s). P.W.8 (I.O) has, however, a different story to narrate. He has stated that late in the night a call was received about the murder in the village whereafter he was instructed by the Station House Officer, Nathnagar Police Station to proceed to the place of occurrence. At about 12.30 A.M. in the night, he started on foot and reached the village Bairya Bandal Bind Toli early in the morning of 01.11.2007 where the statement of P.W. 7 was recorded at 6:45 A.M. His evidence materially contradicts the statement of the



informant about the recording of the first version of the prosecution case on 31.10.2007 at 11.00 P.M. It has been argued with much vehemence that if the evidence of P.W.7 is to be believed, then it is a case where the prosecution has withheld the first version of the prosecution case which creates a serious doubt on the veracity of the prosecution case. The evidence on record supports the submissions of the defence.

14. We would next examine whether P.W.7 was at all present at the place of occurrence when the incident had occurred. P.Ws. 2 and 6 are the own nephews of the informant. The evidence of P.W.2 in para 6 and 7 and the evidence of P.W.6 in para 10 completely negates the said claim of the informant. They have deposed to the effect that the informant (P.W.7) was not around when the incident/occurrence had taken place. He was called later after the incident. Considering their specific statement made before the Court and their inter se relationship, the Court has no hesitation in concluding that the claim of the informant as an eye-witness to the occurrence cannot be accepted. He is not a truthful witness. He had an axe to grind against the appellants. It is a serious jolt to the prosecution case.



15. Having held so, we shall advert to the evidence of P.Ws 2 and 6. It has been vigorously argued by the defence that their evidence(s) also suffer from serious inner contradiction(s) on the manner of occurrence. The evidence of P.W.6 has, in particular, been criticized referring to the Fardbayan (Ext.2) as the same was recorded in his presence and also bears his LTI. Drawing our attention to the Fardbayan, it has been submitted that as per the Fardbayan, the co-accused Sudhir Mandal first fired at D-2 in her right waist, as a result whereof she died instantaneously. Thereafter, A-2 and A-5 fired at D-1. The firing made by A-2 hit on the stomach whereas the firing resorted to by A-5 hit the chest of D-1. In court, P.W. 6, however, has stated that it was A-5 who fired and hit the mother (D-2) as a result whereof she died whereafter A-4 also assaulted. Insofar as D-1 is concerned, this witness has stated that co-accused Sudhir Mandal and A-2 fired at his father. P.W.6 has, therefore, materially contradicted himself in course of his deposition on the manner of occurrence. We would here consider the objective finding(s) of the doctor in the post mortem report(s). the autopsy surgeon in the post mortem report (Ext.5) of D-1 found the following ante mortem injuries:-



Injury No.1. One entry wound of 1"x1/2" on left side of front of chest. 2" left from mid line and 1/2" below from left clavicle, margin lacerated and inverted and blackening present in 1/4"x3/4" area surrounding the entry wound tattoo present in 5"x4" area on front of face more on left side.

2. One exit wound of 1/2" diameter on left side of back of chest 1/2" left from mid line and 8" below medial from left shoulder tip margin lacerated everted.

3. One entry wound of 1"x1/4" size on right lateral aspect of chest on posterior auxiliary line 6" below from axilla 1/2" right from midline in front of chest margin lacerated and inverted.

4. One exit wound 3/4" diameter on front of abdomen 1" above from umbilicus and 1/4" right from midline.

On dissection blood was found in the chest and abdominal cavity. First rib on front of left side of chest and fourth rib on back of left side of chest were found fractured. The left lung and ascending aorta were found lacerated. Seventh rib on right lateral aspect of chest was fractured. The diaphragm and liver were found lacerated. Stomach contained about 200 gram semi digested food material. Heart was empty. In general all viscera was found pale. Injury no.1 and 2 and injury no.3 and 4 were corresponding with each other and structures in between were pierced through and through.

16. In the post mortem report (Ext.6) of D-2, P.W.9(doctor) found the following ante mortem injuries:-



1. One entry wound of 1"x1/4" on right inguinal. 6" below and right from umbilicus and 4" right from midline, margin lacerated and inverted.

2. One exit wound 1 1/2"x1/2" of on back of upper and lateral aspect of right buttock, 11" right and below from umbilicus margin lacerated and inverted.

On dissection- Blood was found in the abdominal cavity. Right hip bone was found fractured near iliac crest. One spiral plastic material and six pieces of wads were found near right hip bone. Stomach contained about 250 gram semi digested food material. Heart was empty. In general all viscera were found pale.

17. It crystallizes from the medical evidence that D-2 (Deepya Devi) had received only one fire-arm injury whereas D-1 had received two injuries caused by fire-arm. Injury nos.1 and 2 and 3 and 4 on D-1 were found communicating to each other, one being the wound of entry and the another being the wound of exit. The consistent case of the prosecution is that the D-1 was fired at chest and stomach. The situs of injuries found on D-1, in our view, do not fall in line of the case suggested by the prosecution. That apart, the testimony of P.W.6, in particular, becomes doubtful as he has assigned one of the fire arm injuries caused on the person of his father to co-accused Sudhir Mandal which runs contrary to the evidence of other witnesses as well as the Fardbayan of which



is also a signatory. On closer scrutiny, it is also found that so far as D-2 (Deepya Devi) is concerned, this witness has made serious aberrations. The author of the two injuries has been changed. The background of hostility for which we did not find safe to refer on the evidence of the informant (P.W.7), to some extent, is applicable in the case of P.W.6 as well. In **Muluwa** (supra) the Apex Court observed as under:-

“It is elementary that the evidence of an infirm witness does not become reliable merely because it has been corroborated by a number of witnesses of the same brand; for, evidence is to be weighed not counted. Since the evidence of P.Ws. 5 and 6 suffered from the same infirmities as that of Smt. Jugatia, it cannot be said that the trial Judge had no basis, whatsoever, for stigmatizing it as unreliable.”(Emphasis is added).”

18. P.W. 2 is the brother of P.W.6. He has given an ocular account/description of the prosecution case. It has been argued on behalf of the State that the presence of P.W.2 being the son of the D-1 and D-2 at the scene of occurrence cannot be doubted. He has deposed on the manner of occurrence as spelt out in the Fardbayan (Ext.2). The defence has, however, criticized his evidence referring to his statement in para 5



where he changed the place of occurrence in village Dildalpur which is the village of P.W.7. According to this witness, more than 10 shots were fired in course of occurrence but the I.O. did not find any sign of firing on the surrounding wall/Tatti as claimed by the prosecution inasmuch as he did not find and collect the shells of fired cartridges. Non-presence of empty shells of the cartridges at or around the place of occurrence, to some extent, pollutes the evidence of P.W.2. The witness was given a suggestion by defence for falsely deposing in the case as the appellants were the witnesses in the murder case of Toofani Mandal, own nephew of co-accused Sudhir Mandal. The Court does not find safe to convict the appellants solely on his testimony. The evidence of P.Ws. 3 & 4 could have given credence to the prosecution and removed the doubt in the mind of the court. However, both of them having not supported the prosecution case were declared hostile.

19. Coming to the source of identification which has been challenged by the defence, it is found that the occurrence was committed at the dead of night. According to the Fardbayan and the consistent case presented at the trial, more than 12 accused persons had participated in the offence/crime. P.W.2 in his evidence has stated about the presence of



Dibiya(lamp) at the scene of occurrence whereas the Fardbayan (Ext.2) is silent. The informant and the witnesses were present outside the house on the open Chabutra(platform) when attacked. Although the P.W.2 has claimed to have shown to the I.O. the presence of Dibiya(lamp) but the I.O., in his deposition, stated about non-recording of the presence of the lamp at the scene of occurrence. Furthermore, the claim of identification of the appellants amongst at least 10 accuseds in the feeble light of 'Dibia' is difficult to accept. The evidence on record on this aspect leaves such claim of identification by the P.Ws not fully free from doubt. As noted above, the distinct facet of the prosecution case is that the first version of the case recorded by the informant (P.W.7) on the date of occurrence at 11.00 P.M. duly signed by P.W. 6 has been withheld by the prosecution. The Court can legitimately presume that the first statement of the incident was not the one which was presented at the trial. Thus suppression of the first FIR casts doubt on the prosecution case. Reference in this regard be made to **Hem Raj vs. State of Haryana (Cr. L.J 2005 2152; para 12)**. The Court would recount here the statement of the I.O. that the first information given to him on telephone by the informant reduced as station diary entry did



not disclose the name of the offender(s). Such call as per P.W.2 and P.W.7 (informant) was made by the informant in presence of P.W.2.

20. In the facts and circumstances emerging from the records, the Court suspects the truthfulness of the prosecution case and extends the benefit of doubt to the appellants. Resultantly, the appeal(s) are allowed. The judgment of conviction recorded against them by the trial court is set aside.

21. A-2 Bangata Mandal and A-5 Nagay Mandal are in jail custody. They are directed to be set at liberty, if not required in any other case. A-1 Bateshwar Mandal, A-3 Pairu Mandal and A-4 Bablu Mandal are on bail. They are discharged from the liability of their bail bonds.

(Kishore Kumar Mandal, J)

I agree (Madhuresh Prasad, J)

HR/-

AFR/NAFR	NAFR
CAV DATE	10.10.2017
Uploading Date	18.10.2017
Transmission Date	18.10.2017

