

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

**Criminal Appeal (DB) No.510 of 1989**

(Against the judgment of conviction and order of sentence dated 29.08.1989 passed by Shri Bal Krishna Jha, learned 2<sup>nd</sup> Additional Sessions Judge, Samastipur in Sessions Trial No. 118/83 + 185/87 / 17 of 1987, arising out of Hasanpur P.S. Case No. 5 (8) of 1978)

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1. Ram Pati Yadav, son of Sukhdeo Yadav  
2. Jagdish Yadav, son of Sukhdeo Yadav  
Both residents of Village- Pratapur, Police Station- Sahebpur Kamal, District- Begusarai

.... .... Appellant/s

Versus

The State of Bihar

.... .... Respondent/s

**With**

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**Criminal Appeal (DB) No. 51 of 1992**

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Lukher Yadav @ Lookho Yadav, son of late Chamroo Yadav, resident of Village- Pratapur, Police Station- Sahebpur Kamal, District- Begusarai.

.... .... Appellant/s

Versus

The State of Bihar

.... .... Respondent/s

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**Appearance :**

(In CR. APP (DB) No.510 of 1989)

For the Appellant/s : Mr. Ranbir Singh, Amicus Curiae

For the Respondent/s : Mrs. Shashibala Verma, APP

(In CR. APP (DB) No.51 of 1992)

For the Appellant/s : Mr. Ranbir Singh, Amicus Curiae

For the Respondent/s : Mrs. Shashibala Verma, APP

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**CORAM: HONOURABLE THE CHIEF JUSTICE**

**And**

**HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY**

**ORAL JUDGMENT**

**(Per: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY)**

**Date: 07-10-2017**

Criminal Appeal (DB) No. 510 of 1989 has been preferred by Ram Pati Yadav and Jagdish Yadav, whereas Criminal



Appeal (DB) No. 51 of 1992 is a jail appeal filed on behalf of Lukher Yadav @ Lookho Yadav.

2. Both the appeals arises out of the same judgment of conviction and order of sentence dated 29.08.1989 passed by learned 2<sup>nd</sup> Additional Sessions Judge, Samastipur in Sessions Trial No. 118/83 + 185/87 / 17 of 1987, arising out of Hasanpur P.S. Case No. 5 (8) of 1978, whereby the appellant herein, namely, Rampati Yadav (Cr. Appeal (DB) No. 510 of 1989) has been convicted under Section 302 of the Indian Penal Code and sentenced to undergo R.I. for life. The appellants, namely, Jagdish Yadav (Cr. Appeal (DB) No. 510 of 1989) and Lukhar Yadav @ Lookho Yadav (Cr. Appeal (DB) No. 51 of 1992) have been convicted under Sections 302/149 of the Indian Penal Code and sentenced to undergo R.I. for life. All the three appellants have been acquitted from the charge under Section 307 of the Indian Penal Code.

3. The prosecution case as appears from the fardbeyan of the informant is as follows:

The informant in his fardbeyan stated that she is the daughter of Baso Yadav of village Gangia, P.S.- Khagaria in the district of Begusarai and was married to Rampati Yadav with whom she lived only for one year, but she was deserted by her husband for non-payment of dowry money. The informant further stated that she



solemnized another marriage with Hare Krishna Yadav (P.W.8) of village Surha Basantpur, P.S. Hasanpur in the district of Samastipur on account of which her first husband was very angry. It is further alleged that in the night of 6/7-8-1978, she was sleeping in a room with her husband (P.w.8) and in the other room Mahendra Yadav, the elder (cousin brother of her husband) was sleeping. At about 1.00 A.M. in the night of the alleged date of occurrence i.e. 6/7-8-1978, she heard some sound (Gulgulahat) in her Angan, whereupon she opened her door and saw that Rampati Yadav and Lukher Yadav were entering into the room of Mahendra Yadav (since dead), whereas Lugo Yadav, Jagdish Yadav, Parmanand Yadav , Khedan Yadav and Gulo yadav, all of village Pratarpur, P.S.- Balia, District-Begusarai, were standing on the door. It is further alleged that those, who were inside the room, killed Mahendra Yadav, because the informant heard two sound of firing and she thought that the accused persons had come to kill her husband. She has thereafter been said that she began to shut her door, but the accused persons came there, her husband pressed the door from inside, whereas the accused persons pressed from outside, but the door opened and her husband getting an opportunity fled away towards the maize field in the north. Further allegation is that all the seven accused persons chased her husband but he entered into the village raising alarm. Shortly



thereafter her husband returned with the villagers with injuries on his person. The informant saw her Bhaisur Mahendra dead and revealed the name of seven accused persons, who she had identified. The informant's father-in-law, who was on the outside the Darwaza was also assaulted, but the informant did not see as to who assaulted him. The informant claimed that the accused persons killed her Bhaisur Mahendra Yadav and injured her husband and her father-in-law.

4. The fardbeyan was recorded at 7.00 A.M. on 07.09.1978 by the officer-in-charge, Hasanpur police station camp and on the basis of the fardbeyan formal F.I.R. bearing Hasanpur P.S. Case No. 5 (8) of 1978 has been registered at 11.30 A.M. for the offence under Sections 302 and 307/34 of the Indian Penal Code. The dead body of the deceased was forwarded for post-mortem and the Dr. Laxmi Narayan Prasad conducted post-mortem of the deceased Mahendra Yadav.

5. The police after investigation submitted charge-sheet against the appellants and one Gulo Yadav thereafter the learned Magistrate took cognizance of the offence and committed the case to the Court of Sessions for trial. The appellants and Gulo Yadav pleaded not guilty and as such they were put on trial.

6. On behalf of the prosecution, altogether 09 witnesses were examined. P.W. 1 is Krishnadeo Prasad Yadav,



P.W.2 is Anjani Kumar, P.W. 3 is Dinananth Singh, P.W. 4 is Dr. Laxmi Narain Prasad, who conducted the post-mortem examination on the dead body of deceased. P.W.5 is Shrilal Yadav, P.W.6 is Krishna Narain @ Krishnadeo Yadav, P.W. 7 is Shushila Devi (informant), P.W.8 is Hare Krishna Yadav (husband of the informant) and P.W. 9 is Jaikant Jha. Out of which P.Ws. 1, 2, and 3 are formal witnesses. P.W.4 is the doctor, who performed the post-mortem. P.Ws. 5 and 6 during the course of deposition have pleaded that they have no knowledge about the occurrence. P.W.7 is the informant of the case and P.W. 8 is the husband of the informant. P.W. 9 is a formal witness, who has proved the endorsement made by the officer-in-charge of Hasanpur police station.

7. Mr. Ranbir Singh, counsel appearing on behalf of appellants as Amicus Curiae submitted that in the instant case, the trial court has committed error in holding the appellants guilty. The prosecution case suffers from various infirmities and taking the entire facts and circumstances any reasonable man can arrive at a finding that the prosecution has failed to establish the charge beyond all reasonable doubt. He submitted that the trial court while convicting the appellants failed to take into consideration various aspects, which goes to prove that the appellants have not committed the offence and merely on suspicion they have been convicted in the instant case. He



submitted that in the instant case the investigating officer was not examined and in absence of investigating officer, the appellants have suffered serious prejudice, as even the case diary was not exhibited. He referred to various circumstances to indicate that in the absence of the examination of the investigating officer and on account of non-exhibit of the case diary, the appellants were denied the opportunity of fair hearing, as they could have taken the benefit of contradiction in the statement of the witnesses recorded under Section 161 of the Cr.P.C. and their depositions before the court. He stated that in fact during course of investigation, the police has examined as many as 14 witnesses including Binda Devi (widow of the deceased Mahendra Yadav) and Baleshwar Yadav (father-in-law of the informant) who allegedly sustained injuries during the course of commission of the aforesaid crime, but they were not examined in the instant case. In the charge-sheet, only five witnesses were named i.e. informant (P.W.7), her husband (P.W.8), Mishri Yadav (not examined), Krishnadeo Yadav (P.W.6) and the doctor (P.W.4), but no reason was explained by the prosecution for non-examination of Mishri Yadav, Binda Devi and Baleshwar Yadav (father-in-law of the informant). In particular, non-examination of Binda Devi and Baleshwar Yadav has rendered the prosecution case under serious doubt. He next submitted that the two witnesses on behalf of the



prosecution have denied that they have any knowledge about the occurrence, they are P.W. 5 and P.W.6.

8. Referring to the deposition of P.W.7 and P.W.8, he submitted that there are material contradiction in their statements made before the investigating officer and the Court in the manner of occurrence and the means of identification. The incident allegedly took place in the night and identification of the appellants is under serious doubt. On behalf of the appellants, it has been contended that in this case, the informant Sushila Devi and her husband are claiming to be the eye witness of the incident. As per the informant, she was sleeping in her room with her husband, whereas her Bhaisur, the elder brother of the husband of the informant, namely, Mahendra Yadav (deceased) was sleeping in his room and in the dead night at 1.00 A.M. when she heard sound of Gulgulahat in her Angan, she came out of her room, she saw that her first husband Rampati Yadav and Lukher Yadav entered the room of her Bhaisur. She spotted that the other accused Jagdish Yadav, Permanand Yadav, Gulo Yadav and Khedan Yadav were standing at the Darwaja. She claimed that the accused, who entered the room of her Bhaisur has murdered him, as she heard the sound of firing twice from the room and thereafter the accused attempted to assault her husband, who run away from the room and the accused persons chased him and inflicted injury on



him. Her husband has raised alarm and thereafter came back with villagers. She stated that in this manner her Bhaisur was murdered and father-in-law was injured in the commission of crime by the accused.

9. Counsel for the appellants further submitted that there is contradiction in the statement of the informant in her fardbeyan (Ext-1) and the statement before the Court. In fardbeyan, the informant said that she come out from her room on hearing Gulgulahat, but in Court she said that she woke up on hearing firing sound. If that was the case, then placing reliance on her version that she saw the ex-husband Rampati (appellant) entering the room of her Bhaisur cannot be relied upon. In addition thereto, she stated that Dibia was burning in the room of the deceased, whereas in the Court she stated that she could identify the accused persons in the flash of torch light. There is contradiction in her fardbeyan that after getting opportunity her husband (P.W.8) fled away towards maize field and thereafter he raised alarm and within short time he returned back with villagers and he was injured, but before the investigating officer she stated that accused persons pushed her in her room and dragged out her husband, and after the occurrence when she enquired, the villagers informed her that her husband went to hospital and returned back in next morning. He submitted that in this case Gulo Yadav,



who was named in F.I.R. and even charge-sheeted was acquitted on the statement of the informant in the court wherein she said that Gulo Yadav was not among the accused spotted by her on the night at the crime scene.

10. Counsel for the appellants submitted that the trial court has noted the fact that neither the doctor, who examined the P.W.8, who claimed to have sustained injury during the commission of the crime nor the father-in-law of the informant was examined in the Court nor the injury report was brought on record. The aforesaid serious lapse goes against the prosecution. Counsel for the appellants next submitted that in the instant case, the most material witness of the incident was Binda Devi, widow of the deceased Mahendra Yadav, who in her statement before the investigating officer stated that in the night of occurrence, she was sleeping in her room along with her children and her husband was sleeping on the Varanda. She woke up hearing sound of Katta and found her husband dead. She heard the sound of assailants fleeing away, but she could not recognize anybody. Referring to the aforesaid fact, the appellants submitted that the prosecution case stands falsified by the version of Binda Devi that the deceased Mahendra Yadav was killed inside the room, where he was allegedly sleeping. Referring to the contradictory version of P.W.7 and P.W.8, counsel for the appellants



submitted that the version of the prosecution cannot be relied upon for the reason that P.W.8 did not name any one before the investigating officer, who even not mention before the investigating officer that his wife has said about the identification of any accused persons, but as an after thought he developed the story of identifying the accused persons. Thus, the version of P.W.7 and P.W.8 runs contradictory to each other.

11. Counsel for the appellants next submitted that the appellants have no motive for the occurrence and if the motive of occurrence, as per the prosecution case, is taken on its face value it renders the prosecution case most improbable. The appellant Rampati Yadav if at all has any enmity it was against the informant, who stated that Rampati Yadav was her first husband and he was annoyed on account of her joining the wed lock with P.W.8, in that situation, if the enmity was the reason for commission of crime, then the appellant Rampati Yadav could have taken revenge against the informant or her husband and there was no motive even imaginary against the deceased Mahendra Yadav. Thus the appellant has absolutely no grudge or enmity against the deceased Mahendra Yadav and as such no prudent man can accept that the appellants have any motive behind killing the deceased Mahendra Yadav. The judgment of the trial court is based on full of conjectures. The trial



court ought to have rejected the prosecution case of identification, motive considering apparent contradiction in their version before the police as well as in the Court. The trial court ought to have taken note of the fact that neither the investigating officer was examined in the court nor the case diary was marked as exhibit, which has caused serious prejudice to the appellants in this case. He submitted that in absence of *mens rea*, the trial court committed error in convicting the appellants. Thus, he submitted that the cumulative effect of the serious lapse in conduct of the trial including non-examination of the injured (father-in-law of the informant) and withholding of other material witness including Binda Devi indicates that the appellants have been falsely implicated in this case.

12. We have gone through the entire materials on record and examined the depositions of the witnesses. We find substance in the submission of the appellants that the trial was not conducted in fair manner, as the investigating officer was not examined nor the case diary was marked as exhibit. There is no explanation for non-production of the material witnesses, particularly, Binda Devi (wife of the deceased) and father-in-law of the informant, who according to prosecution sustained injury in the occurrence. Presumably they are the most competent and material witness, who could have unfolded the true narratives of the incident.



Shifting stands of the informant as to the source of identification also creates doubt. That a part, we have noticed that in the instant case, the appellant Jagdish Yadav was released on bail on 01.11.1989, whereas Ram Pati Yadav was granted bail on 19.12.1990 and Lukher Yadav @ Lookho Yadav was granted bail on 28.04.1992. All the three appellants have remained in jail all along during trial.

13. The charge-sheet in the aforesaid case was filed on 30.08.1979 and they have been subjected to the ordeal of trial for nearly 10 years. Appellant Jagdish Yadav has remained in custody for 11 years, appellant Rampati Yadav has remained in custody for about 12 years and appellant Lukher Yadav @ Lookho Yadav has remained in custody for nearly 14 years.

14. Considering the appeals in its totality, we find that the appellants have practically served the sentence of the offence, as they have remained in jail for 11 to 14 years in a case where we find substance in the contention of the appellants about the doubtful identity, lack of motive and serious prejudice on account of withholding of material witness and non-examination of the investigating officer and non-exhibit of case diary. In the absence of examination of the investigating officer, as there are contradictions in the version of the witnesses, the prosecution case cannot be taken as full proof.



15. In the circumstances, we are of the considered view the appellants deserve benefit of doubt in both the appeals.

16. In the result, both the appeals are allowed. The judgment of trial court is set aside. The appellants are discharged from the liabilities of their bail bonds.

17. Let a copy of the judgment be handed over to Mr. Ranbir Singh, who has appeared in these appeals, as Amicus Curiae for needful.

18. The Patna High Court Legal Services Authority is directed to pay the fixed remuneration to Mr. Ranbir Singh, who has appeared in these appeals, as Amicus Curiae.

**(Rajendra Menon, CJ)**

**(Anil Kumar Upadhyay, J)**

Uday/-

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