

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.316 of 1993

1. Rajdeo Rai, son of Late Sipahi Rai
2. Vishwanath Rai, son of Late Yamuna Rai
Both residents of Village- Chaturbhuj Chapra, Police Station-Baniapur,
District-Saran

... .. Appellants

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant/s	:	Mr. Uma Kant Shukla, Adv. Mr. Arun, Adv. Mr. Ansul, Adv.
For the Respondent/s	:	Mr. Ajay Mishra, A.P.P.

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR
and
HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 31-08-2017

Two appellants have approached this Court by filing the present appeal under Section 374(2) read with Section 389 of the Code of Criminal Procedure against the Judgment of their conviction dated 29.05.1993 and order of sentence dated 31.05.1993 passed by Sri Ramnath Ram Mahto, learned 6th Addl. Sessions Judge, Chapra in Sessions Trial No.197 of 1991/1 of 1992. Both the appellants were convicted under Section 302/34 of the Indian Penal Code and Sections 27/35 of the Arms Act and they were sentenced to undergo rigorous imprisonment for life.



However, no separate sentence was imposed for conviction under Sections 27/35 of the Arms Act.

2. Short fact of the case is that on 16.07.1991 at about 2.45 A.M. in village-Anandpur, Police Station-Baniapur, district-Saran, the Officer Incharge of Baniapur Police Station, namely, Sri L.P.Srivastava recorded fardbeyan of Dinanath Rai. In the fardbeyan, the informant stated that in the same night, he was sleeping in his Varandah. In the night at about 1.00 A.M., 8-10 miscreants arrived and awoke him. One of the miscreants asked from another miscreant as to whether he was Krishna Rai. Thereafter, he was told that he was not Krishna Rai. The informant claimed that in the torch light of accused persons, he identified the person, who disclosed that he was not Krishna Rai, as accused Vishwanath Rai (appellant no.2). The informant further disclosed that Vishwanath Rai was having a country-made pistol in his hand. In the meanwhile, due to alarm, his nephew, namely, Lakshman Rai, son of Late Daroga Rai, who was sleeping on the roof, was fired by Rajdeo Rai (appellant no.1) on misconception that he was Krishna Rai. At the time of firing, Lakshman Rai (deceased) was standing on the roof. After receiving fire arm injury, he died. Thereafter, all the accused persons started to search for the documents in the house of the informant and with a view of search



documents, entered into the house and after taking document they came out. In the meanwhile , number of villagers assembled. However, miscreants said that they were not dacoits and their work had already been completed and , as such, they asked the villagers to keep away. Thereafter, all accused persons fled towards southern side. The informant further stated that before killing, one miscreants from the roof side had come and opened the door. He did not identify other accused persons. The informant further disclosed that in between Krishna Rai (who is Bhagina of the informant) and accused Vishwanath Rai and Rajdeo Rai , a dispute was continuing in respect of *Bakhsinama* (deed of gift) and the informant was favouring his Bhagina. He categorically stated that accused Rajdeo Rai, at the time of occurrence, was wearing green shirt and Paint and accused Vishwanath Rai was wearing Dhoti and Kamij. The informant also claimed that both accused persons were also identified by his wife. After recording fardbeyan, on the same date i.e. 16.07.1991 at about 5.00 A.M. , a formal F.I.R. was drawn vide Baniapur P.S. Case No.71/91 against two named accused and eight other unknown persons for the offence under Section 147, 148, 149, 302 of the Indian Penal Code and 27 of the Arms Act. After registering F.I.R. the police investigated the case and after investigation finding the case true, chargesheet was



submitted against both the appellants on 29.08.1991. Thereafter, on 05.09.1991, the learned Magistrate took cognizance of offence under Section 302/34 of the Indian Penal Code and Section 27 of the Arms Act. After compliance of formalities under Section 207 of the Code of Criminal Procedure, the case was committed to the court of Sessions. Thereafter, the case was numbered as Sessions Trial No.197/91.

3. On 26.06.1992, both accused persons were charged for offence under Section 302/34 of the Indian Penal Code and Sections 27/35 of the Arms Act. Since both the appellants denied the charges, the prosecution to prove the case examined altogether 11 (eleven) witnesses. Out of eleven witnesses, Narsingh Rai (P.W.1) and Ram Nath Rai (P.W.2) are hearsay witnesses, whereas Mahabir Rai (P.W.3), father of the informant has claimed to be eye witness to the occurrence. Krishna Rai (P.W.4), son of the informant was examined on the point of motive and he stated regarding land dispute in between him and both the appellants. Rajesh Rai (P.W.5) and Jiyut Rai (P.W.6) were tendered for cross-examination. Kadami Devi (P.W.7) is the wife of the informant and she has claimed that in the occurrence, she had identified appellant no.1-Rajdeo Rai. Dinanath Rai (P.W.8) is the informant and eye witness to the occurrence, whereas Dr. Ramesh



Kumar Sinha(P.W.10) has conducted postmortem examination on the dead body of the deceased and Lalan Prasad Srivastava (P.W.9) , who is a sole Investigating Officer of the case, had recorded fardbeyan, investigated the case and submitted chargesheet. Shashi Bhushan Prasad (P.W.11) , an advocate's clerk, was introduced to prove fardbeyan , which was marked as **Ext.5.**

5. Sri Uma Kant Shukla, learned counsel, assisted by Sri Arun, learned counsel for the appellants, at the very outset, by way of placing entire evidence, has argued that the entire prosecution case has failed due to the reason that though the informant, who had claimed to be eye witness to the occurrence and in the fardbeyan, he stated that before time of occurrence, he was sleeping on Varandah, during his evidence, he has changed his presence from Varandah to *Sahan*. He submitted that purposely Dinanath Rai (P.W.8) had changed his position to justify that he had seen the accused firing from ground floor to the roof, where he was standing. He submits that once the evidence of the informant who, according to him, was solitary eye witness, has come under the cloud of doubt, the entire prosecution case may not be believed. It has further been argued that the evidence of Krishna Rai (P.W.4) also creates serious doubt on the prosecution case.



He submits that it is consistent case of the prosecution that accused persons had arrived with a motive to kill Krishna Rai (P.W.4), who was none else , but Bhagina of the informant and cousin of appellants and, as such, there was no reason to have any confusion to identify Krishna Rai or the deceased. He submits that had the appellants visited the house of the informant only and only with a view to kill Krishna Rai , there was no reason to fire on Lakshman Rai on mis-identification. Moreover, Krishna Rai , though had put his signature on the inquest report, which was prepared at 3.00 A.M. on the same date i.e. 16.07.1991, immediately after recording fardbeyan , this witness was not examined by the Investigating Officer for several dates and his statement under Section 161 of the Code of Criminal Procedure was recorded on 08.08.1991 i.e. about three weeks from the date of occurrence. This witness Krishna Rai in his evidence has stated as if he was not at all present either at the time of recording fardbeyan or preparation of inquest report , rather this witness has stated that on the next date he reached the house of the informant, while dead body was already forwarded for the postmortem examination report. It was further submitted that it appears that a dacoity was committed in the house of the informant and in course of dacoity , Lakshman Rai was killed, but Krishna Rai concocted a story with



a view to wreak vengeance against both the appellants, with whom there was already litigation. He submits that the conduct of Krishna Rai (P.W.4) suggests that he was the master-mind for concocting story, so that the appellants may be fixed in the occurrence. According to Sri Shukla, learned counsel for the appellants, even some of the villagers, who were examined as prosecution witness, in clear term had stated that they had chased the **dacoits**. Meaning thereby that it was a case of dacoity and, thereafter, colour of murder was given by the prosecution side only with a view to implicate both the appellants. It has also been argued that during evidence , Sri Lalan Prasad Srivastava, Investigating Officer has categorically stated that in the morning of occurrence itself, Vishwanath Rai (appellant no.2) was arrested from his house and no incriminating article was recovered from his house. He submits that had it been a case of participation by appellant no.2, Vishwanath Rai in the occurrence, which had taken place in the night at 1.00 A.M. , in normal course, the appellant would not have stayed at his residence, from where he was apprehended by the police. Sri Shukla, learned counsel for the appellants has further argued that it is specific case of the prosecution that gun-shot injury was given from the ground floor, whereas Lakshman Rai was standing on the roof and the height of



roof was more than eight feet. By way of referring to the post-mortem examination report as well as the evidence of Dr. Ramesh Kumar Sinha (P.W.10), learned counsel for the appellants, he has argued that the injuries found on the person of the deceased suggest that the manner, in which the prosecution occurrence was said to be committed, was not possible. The doctor (P.W.10) had found charring mark on the person of the deceased and in cross-examination, this witness (P.W.10) has categorically stated that charring mark can only be caused , if firing is made within the range of three feet. He submits that besides the evidence of Dr. Ramesh Kumar Sinha(P.W.10), as per medical jurisprudence, charring is caused only in case of firing from the close range. According to Sri Shukla, even the prosecution story may not be believed on the basis of injury found on the person of the deceased. He has further argued that though Kadami Devi (P.W.7), wife of the informant in her examination-in-chief had claimed to identify Rajdeo Rai (appellant no.1) in the occurrence, from her evidence during cross-examination, this fact appears to be not believable. He submits that this witness (P.W.7) had stated that appellant Rajdeo Rai, at the time of occurrence, had slapped her and, thereafter, he got down from the stair. He has argued that once the appellants were relative and known to the prosecution



side, in normal course such act of the appellants in the occurrence was not believable. Moreover, in her cross-examination, this witness (P.W.7) has stated that after the occurrence her husband told her to name accused persons. Meaning thereby that this witness (P.W.7) whatever had stated, had stated as per instruction of her husband, who is none else but the informant of the case. By way of referring to the evidence of Krishna Rai (P.W.4), he has argued that this witness Krishna Rai had given detail about the land dispute in between him and both the appellants and, as such, there was every possibility for him to implicate both the appellants. Even the informant and his family members, who have come forward as prosecution witness, have used the word “dacoits” in the occurrence. On the aforesaid ground, it has been argued that the case of the prosecution was not beyond reasonable doubt and, as such, it is a fit case for setting aside the impugned Judgment.

6. Sri Ajay Mishra, learned Addl. Public Prosecutor, opposing the appeal, has argued that the informant is the main eye witness and in his examination-in-chief, he has categorically stated about the participation of both the appellants in the occurrence. Though this witness was cross-examined at length, nothing could be extracted to create doubt. He has further submitted that Kadami



Devi (P.W.7) is the wife of the informant, who had seen at least appellant no.1, Rajdeo Rai at the time of occurrence. According to him, the learned trial judge, on the basis of evidence available on record, has rightly passed the impugned Judgment, which requires no interference.

7. Besides hearing learned counsel for the parties, we have minutely perused the entire evidence available on record. In the case, it is necessary to firstly discuss the evidence of the informant Dinanath Rai (P.W.8). This witness (P.W.8) in his examination-in-chief has stated that on 15/16-07-1991 at 1.00 A.M., he was sleeping in the *Sahan* of Verandah of *Dalan*. After noticing arrival of the accused, he awoke and in the torch light of accused, he noticed that 10-11 accused persons were standing. One miscreant asked from another miscreant as to whether he was Krishna Rai. Thereafter he was told that he was not Krishna Rai. This witness (P.W.8) said that the accused, who said that he was not Krishna Rai, was Vishwanath Rai (appellant no.2), who was carrying a country-made pistil in his hand. Within 2-3 minutes, main door of his house was opened and 5-6 accused persons, thereafter, entered in the house and amongst them, the informant identified Vishwanath Rai (appellant no.2) also. He stated that on the roof of his house, his nephew, his wife and his four sons were sleeping. From the side of



the informant, Rajdeo Rai fired from his gun on his nephew, who was standing on the roof. After receiving fire-arm injury, he fell down and he died at the place of occurrence. Thereafter, accused persons took all the papers and spread articles and fled away. He claimed that amongst those papers, there was one Bakhsisnama (copy of deed of gift) of Krishna Rai . He stated that accused persons had not taken away either ornaments or currency notes. He said that before going, accused persons had locked him in southern room. The **dacoits** were chased by the villagers. However, they said that don't follow them, they were not dacoits and they completed their work. He further stated that in between Krishna Rai (P.W.4) and Vishwanath Rai (appellant no.2) as well as Rajdeo Rai (appellant no.1), there was dispute in relation to Bakhsisnama (deed of gift). Due to such dispute Krishna Rai (P.W.4) was mostly residing in the house of the informant. He identified his signature on the fardbeyan , which was marked as **Ext.1**. In his examination-in-chief, this witness (P.W.8) stated that even witnesses Ekbali Rai, Triveni Rai, Chandradip Rai, Baijnath Rai and Ramdayal Rai were influenced by the accused side. In paragraph-4 of his cross-examination, he stated that the documents, which were kept in a locked wooden box, were found missing and the said lock was found broken. He further stated that 10-12 dacoits, who had



surrounded him, had also surrounded his father. He further stated that he identified Vishwanath Rai in the torch light of accused themselves and he had also identified appellant Rajdeo Rai. In the same paragraph, he admitted that from Verandah , the person standing on the roof, could not have been seen and stated that he was sleeping in the *Sahan*. At this juncture, it is necessary to be noted that in the fardbeyan, this informant (P.W.8) had stated that before the occurrence, he was sleeping in the Verandah and subsequently the fact that from Verandah, it was difficult to see the person standing on the roof, this witness had changed his position from Verandah to *Sahan*. He denied the suggestion that with a view to favour Krishna Rai, he had implicated the appellants. He further stated that he met Krishna Rai two days after the occurrence, whereas the inquest report categorically makes it clear that at the time of preparation of inquest report, which was prepared at 3.00 A.M. in the same night, this Krishna Rai (P.W.4) was present and he had put his signature on the inquest report. Similarly, Mahabir Rai (P.W.3), father of the informant has also stated almost in the similar manner and, as such, there is no need to elaborate his evidence.

8. Kadami Devi (P.W.7), wife of the informant had claimed to identify Rajdeo Rai (appellant no.1) at the time of



occurrence. She in her examination-in-chief has stated that on the date of occurrence, she was sleeping on the roof and in the mid-night accused persons arrived. She claimed that she had identified Rajdeo Rai (appellant no.1). She further stated that she was twice slapped by appellant Rajdeo Rai and, thereafter, he got down from the stair. Subsequently, Lakshman Rai was fired and he died. She stated that Krishna Rai was her maternal son (Bhagina) and Rajdeo Rai was brother of Krishna. In paragraph-3 of her cross-examination, she stated that the miscreants had locked her husband in a room and, thereafter, she did not open the door. The police arrived in the morning. Before arrival of the police, she had met her husband and her husband had asked her to name accused persons. This statement of Kadami Devi (P.W.7) creates serious doubt on her credibility. She herself has stated that she was asked by her husband to name accused persons. Meaning thereby that she has named the appellants as per instruction of her husband. So far as Narsingh Rai (P.W.1) and Ram Nath Rai (P.W.2) are concerned, they are co-villagers and are hearsay witnesses. Both witnesses have stated that they had chased the dacoits. Since Rajesh Rai (P.W.5) and Jiyut Rai (P.W.6) were only tendered, there is no need to discuss anything about these witnesses.



9. So far as the evidence of Dr. Ramesh Kumar Sinha (P.W.10) is concerned, it is said that on the date of occurrence i.e. 16.07.1991 he was posted as Civil Surgeon at Sadar Hospital, Chapra and on the same date at about 8.35 A.M. he had conducted post-mortem examination on the dead body of Lakshman Rai and found following injuries:

“Multiple lacerated punched out injuries about 1/4” x 1/4” with charring around present on both sides of the abdomen below the umbilical region. On opening the abdominal wall multiple lacerated injuries 1/4” x 1/4” x 1/4” present on the wall of the intestine. The abdominal cavity was full of blood.

Five small pellets were recovered from the intestine and they were preserved in sealed container for needful.”

He proved the postmortem examination report, which was marked as **Ext.4**. In paragraph-2 of his cross-examination, he has stated as follows:

“Charring by fire arm is possible only when it is fired from within the distance of 3 feet. The firing direction I cannot say.”

10. This witness (P.W.10) categorically suggests that charring mark was possible only in case of firing from close range i.e. from the distance of within three feet, whereas it is case of prosecution that the distance from the area of firing and roof was



more than eight feet and, as such, the medical evidence does not support the prosecution case. So far as the evidence of the Investigating Officer Lalan Prasad Srivastava is concerned, it has already been discussed in the preceding paragraphs. This witness had proved the inquest report, which was marked as **Ext.2** and on the inquest report, Krishna Rai (P.W.4) had put his signature. He also proved formal F.I.R. (**Ext.3**). In paragraph-4 of his cross-examination, the Investigating Officer (P.W.9) has stated that on 08.08.1991 he had recorded statement of Krishna Rai under Section 161 of the Code of Criminal Procedure . Once Krishna Rai regarding whom , entire story was cooked up that accused persons had come to kill him, the Court failed to understand as to why once Krishna Rai, at the time of preparation of inquest report, was present, the Investigating Officer recorded his statement after such a long gap. It is a peculiar case that in this case despite the fact that the Investigating Officer , who had recorded fardbeyan , investigated the case and submitted chargesheet, the prosecution did not bother to get the fardbeyan proved by the Investigating Officer and for proving the fardbeyan, one formal witness was introduced i.e. P.W.11, namely,Shashi Bhushan Prasad, who was an Advocate's clerk and he has proved fardbeyan, which was marked as **Ext.5**.



11. Considering the aforesaid evidences, the Court is of the considered opinion that the prosecution case is not beyond reasonable doubt and, as such, it is necessary to extend the benefit of doubt to both appellants. Accordingly, by way of extending the benefit of doubt, the Judgment of conviction dated 29.05.1993 and order of sentence dated 31.05.1993 passed by Sri Ramnath Ram Mahto, learned 6th Addl. Sessions Judge, Chapra passed in Sessions Trial No.197 of 1991/1 of 1992 is hereby set aside and the appeal is allowed.

12. Since both the appellants are on bail and the Judgment of conviction and order of sentence has been set aside, they are discharged from the liability of their bail bonds.

(Rakesh Kumar, J)

(Mohit Kumar Shah, J)

nawalkrs/-

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CAV DATE	N/A
Uploading Date	
Transmission Date	

