

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No. 289 of 1993

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Rajesh Sah, son of Dharam Nath Sah, village of Dhekha, Laxman Tola, P.S.
Motihari Muffasil, District – East Champaran.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

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Appearance :

For the Appellant/s : Mr. Yogesh Chandra Verma, Sr.Adv.
Mr. Uma Shankar Verma, Adv.

For the Respondent/s : Mr. Ajay Mishra, A.P.P.

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

Date : 28-08-2017

The sole appellant had approached this Court by filing the present appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 (for short “Cr.P.C.”) against the judgment of his conviction and sentence dated 21-05-1993 and 22-05-1993 respectively passed in Sessions Trial No. 348/18 of 1992 by Sri J. Ram, learned 1st Additional Sessions Judge, Motihari, East Champaran (hereinafter referred to as “Trial Court”). The appellant has been held guilty and convicted under Section 396 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life.



2. Short fact of the case is that on 07-06-1991 at about 22.30 hours (10:30 P.M.) at Sadar Hospital, Motihari, the officer incharge, Mufassil Police Station namely Sri Harendra Prasad Singh (P.W.- 8) recorded *fardbeyan* of Sri Shambhu Nath Rai, S/o Maharaj Rai, R/o Sugauli Kannu Tola, Police Station – Sugauli, District – East Champaran at Motihari. In the *fardbeyan*, the informant disclosed that in the same evening, he alongwith his brother-in-law Bhagat Raut (deceased) was going to attend marriage of his (deceased) son to village Pathkaulia. He was going on a motorcycle Bajaj M-80, which was being driven by the deceased (Bhagat Raut). At about 8:30 P.M. in the same night, while they proceeded ahead Baswaria, the accused persons from both the side of the road carrying *lathi* and *danda* appeared from the bushes and gave signal to stop. They were talking in Bhojpuri. Thereafter, they accelerated their vehicle, however; the accused persons started giving assault by the *lathi*, whereafter, the informant and his brother-in-law fell down. Even thereafter accused persons started assaulting them by *lathi*, however; in the said occurrence, his brother-in-law Bhagat Raut caught a *lathi* and tried to save him. The informant, to save his life, fled away, whereas, his brother-in-law was caught by the accused persons and they started



assaulting him. After some distance, the informant stopped and thereafter, he noticed a motorcycle and he narrated all the facts to the said person. The informant thereafter went to the place of marriage and narrated about the occurrence and thereafter, on a jeep, he alongwith others again returned to the place of occurrence, where it was noticed that his brother-in-law was lying on the road with several injuries and he was unconscious. The victim was carried to Sadar Hospital and during treatment, he succumbed to the injuries. The informant further disclosed that accused persons had snatched wrist watch from deceased Bhagat Raut and besides this, the accused persons had also looted some currency notes. He disclosed that all the accused persons were of the age in between 25-30 years and described about their wearing.

3. After recording *fardbeyan*, a formal F.I.R., vide Mufassil (Sadar) Motihari P.S. Case No. 54 of 1991 was registered on 07-06-1991 and police, after registering the case, investigated the case. Since in the case, F.I.R. was lodged against 6-7 unknown accused persons, it is necessary to describe certain details, which had come during investigation. On examination of the evidences, it is evident that after recording *fardbeyan*, at about 4:00 on 10-06-1991 in the



morning, a raid was conducted in the house of the appellant and he was arrested on 10-06-1991 and on the next date i.e. on 11-06-1991, he was produced before the learned Chief Judicial Magistrate for recording his statement under Section 164 of the Cr.P.C. and on authorisation of the learned Chief Judicial Magistrate, the statement under Section 164 of the Cr.P.C. was got recorded by Sri Satish Chandra Srivastava, learned Judicial Magistrate, who has been examined as P.W.-9. After about three months, the appellant was put on Test Identification Parade and he was got identified on 04-09-1991 in the T.I.Parade by the informant (Sambhu Nath Rai, P.W.-6) and thereafter, the case was investigated and chargesheet was submitted against the accused persons. The police, after investigation, submitted 1st chargesheet on 06-09-1991 against six accused persons, including appellant, and thereafter, on 22-02-1992, supplementary chargesheet was submitted against three accused persons.

4. After order of cognizance and supply of police paper under Section 207 of the Cr.P.C., the case was committed on 04-05-1992 to the court of sessions and against altogether about seven accused persons charges were framed. So far as appellant Rajesh Sah is concerned, against him, charge was



framed under Section 396 of the Indian Penal Code on 9th June, 1992 and thereafter, separate charge was framed under Section 396 of the Indian Penal Code against accused Madan Mahto and Shyamdeo Mahto. Since the appellant denied the charges, to prove the case, the prosecution examined altogether 11 witnesses. They are:

P.W.-1 Bharat Das
P.W.-2 Joti Lal Das
P.W.-3 Akbar Mian
P.W.-4 Rabindra Dutta Gupta
P.W.-5 Satya Narain Singh
P.W.-6 Shankar Prasad Yadav
P.W.-7 Shambhu Nath Rai (informant)
P.W.-8 Harendra Prasad Singh
P.W.-9 Sri Satish Chandra Srivastava (J.M.)
P.W.-10 Sri Ashok Kumar Singh (J.M.)
P.W.-11 Rajendra Prasad

and out of them, P.W.-7 Sambhu Nath Rai is the informant of the case, whereas, P.W.-5 Satya Narain Singh, who has also claimed to be one of the victim in a difference occurrence on the same date, has not identified any of the accused persons. P.W.-6 Shankar Prasad Yadav, who was a *Taid*, had come forward to prove the *fardbeyan*, which was got marked as **Ext. 1** and he also proved formal F.I.R. as **Ext. 2**. P.W.-9 Sri Satish Chandra Srivastava was at the relevant time posted as Judicial Magistrate and had recorded the statement of the appellant under Section 164 of the Cr.P.C. He proved the



statement recorded under Section 164 of the Cr.P.C., which was marked as **Ext. 7** and he also proved his certificate on the statement recorded under Section 164 Cr.P.C., which was marked as **Ext. 8**. P.W.-10 Sri Ashok Kumar Singh was also a Judicial Magistrate and had conducted Test Identification Parade in the jail and he proved the T.I.P. chart, which was marked as **Ext. 9**, whereas, P.W.-11 Rajendra Prasad, an Advocate's clerk in the present case, had proved the *post-mortem* examination report, which was marked as **Ext. 6**. P.W.-2 Joti Lal Das and P.W.-4 Rabindra Dutta Gupta were only tendered for cross-examination and P.W.-3 Akbar Mian has been examined as hearsay witness, whereas, P.W.-1 Bharat Das has turned hostile. P.W.-8 Harendra Prasad Singh was the investigating officer of the case, who had recorded *fardbeyan*, arrested the appellant, investigated the case and also submitted chargesheet.

5. Sri Y.C.Verma, learned senior counsel assisted by Sri Uma Shankar Verma, learned counsel for the appellant, after placing entire evidences, has argued that it was a case of clean acquittal, however; the learned Trial Court, despite the fact that the case was instituted under Section 396 of the Indian Penal Code, acquitted all the remaining accused persons and



held only the appellant guilty and convicted him under Section 396 of the Indian Penal Code. He submits that in the case, sheet-anchor was the confessional statement of the appellant, which has been marked as **Ext. 7**. By way of placing **Ext.-7**, Sri Verma, learned senior counsel has argued that even on the basis of confessional statement, it is evident that appellant has not stated that he was present at the place of occurrence, rather statement recorded under Section 164 of the Cr.P.C. was exculpatory showing involvement of other accused persons. He has further argued that before recording statement under Section 164 of the Cr.P.C., the learned Magistrate has completely failed to warn the appellant. Even the appellant was not given suggestion that if he makes such statement, such statement may be used against him. According to learned senior counsel, without following the statutory provisions, the statement under Section 164 of the Cr.P.C. was got recorded and accordingly, such statement has got not evidentiary value. According to Sri Verma, once on 11th June, 1991, the appellant was produced before the learned Magistrate for recording statement under Section 164 of the Cr.P.C., it was mandatorily required to firstly warn him and thereafter, grant him reasonable time to think over the matter, but on examination of



the evidence of P.W.-9 as well as on examination of **Ext.-7** i.e. statement recorded under Section 164 of the Cr.P.C., it is evident that no such procedure was followed. Sri Y.C.Verma, learned senior counsel has further argued that it is the case of the prosecution that appellant was arrested on 10th June, 1991 and he was produced on 11th June, 1991 and since thereafter, he was in judicial custody. According to him, regularly the appellant was produced before the learned Magistrate after gap of 15 days and for about 3 months, even then the prosecution had not bothered to conduct any T.I.Parade, but after about three months, the Test Identification Parade was held in the jail i.e. on 04-09-1991 and as such, identification of the appellant, that too by the informant, is not required to be looked into. Besides this, he has argued that though, the informant had claimed to identify the appellant during T.I.Parade, during trial in dock, he categorically denied on the point of identification of the appellant. It has been argued that since in dock, the informant had not identified the appellant, in such situation, identification in the T.I.Parade has got no relevance. Accordingly, it has been argued that the judgment of conviction and sentence of the appellant is liable to be set aside.

6. Sri Ajay Mishra, learned Addl. Public Prosecutor



has argued that once the appellant was identified in Test Identification Parade and during cross-examination of the learned Magistrate, who had conducted Test Identification Parade i.e. P.W.10, if nothing was extracted to create doubt on Test Identification Parade, the appellant's conviction may not be considered, as doubtful.

7. Besides hearing learned counsel for the parties, we have perused evidences on record. The informant Shambhu Nath Rai was examined as P.W.-7. During his evidence, he proved his signature on inquest report, which was marked as **Ext. 3**. In his evidence, he has stated that on 07-06-1991, he was going to attend marriage in Marhaulia village. He was with his brother-in-law (deceased) Bhagat Raut on a motorcycle Bajaj M 80, which was being driven by the deceased. He stated that ahead of Baswaria at about 8:30 P.M. from both the sides of bushes, accused persons came out and tried to stop the informant, however; the deceased accelerated the motorcycle. In the meanwhile, accused persons gave assault by the *lathi*. Deceased Bhagat Raut had caught *lathi* of one of the accused persons, however; the informant fled to some distance and after 5-6 *laghi*, he stopped and noticed that Bhagat Raut was being assaulted. In the meanwhile, one motorcycle arrived from



northern side and in the light of motorcycle, he identified the accused persons, who were in *Lungi* and *Ganji* and one accused was wearing *Dhoti-Kurta*. The informant on the said motorcycle thereafter went to the place of marriage and on jeep he alongwith others arrived and seen that Bhagat Raut had received knife injury and lying on the road at the place of occurrence and his wrist watch as well as currency notes were missing. The injured was thereafter carried to Sadar Hospital. In the same night, Police Officer Harendra Prasad Singh (P.W.-8) recorded his *fardbeyan* in Sadar Hospital and till that time, the injured had already died. The *fardbeyan* was signed by him and in his presence, inquest report was prepared and on inquest report, his signature was got marked as **Ext. 3**. In paragraph – 6 of his evidence, he stated that for identifying accused persons he had gone to jail in Test Identification Parade, in which, he had identified one person, whose name was Rajesh, however; in the same paragraph after seeing all the 7 accused persons, he made categorical statement that the said person, who was identified by him, was not present there. Meaning thereby that he had retracted from his earlier identification in respect of appellant in T.I. Parade.

8. P.W.-5 Satya Narain Singh has claimed that in the



same evening, he was also stopped by accused persons and accused persons had snatched something from him, however; he did not identify any of the accused. Meaning thereby that he was also a victim in relation to a different occurrence on the same date. Since he had not identified any of the accused persons, there is no need to further discuss his evidence.

9. P.W.-6 Shankar Prasad Yadav was a formal witness and Advocate's Clerk. To the reasons best known to the prosecution, he has proved *fardbeyan*, which was marked as **Ext. 1** and he also even proved formal F.I.R., as **Ext. 2**.

10. So far as evidence of P.W.-1 Bharat Das, P.W.-2 Joti Lal Das, P.W.-3 Akbar Mian and P.W.-4 Rabindra Dutta Gupta is concerned, there is no need to discuss their evidences in detail, since P.W.-1 Bharat Das, who had claimed to be chance witness, was declared hostile, whereas, P.W.-2 Joti Lal Das and P.W.-4 Rabindra Dutta Gupta were only tendered for cross-examination. So far as Akbar Mian (P.W.-3) is concerned, he had claimed to be hearsay witness.

11. P.W.-9 Sri Satish Chandra Srivastava had recorded statement of the appellant under Section 164 of the Cr.P.C. and he proved the said statement, which was marked as **Ext. 7**. This witness has also proved a certificate on the bottom



of statement recorded under Section 164 of the Cr.P.C. and same was marked as **Ext. 8**. He has stated that on 11-06-1991, he was posted as Judicial Magistrate in Motihari and on the same date, as per order of the learned Chief Judicial Magistrate, he recorded statement of the appellant Rajesh Sah under Section 164 of the Cr.P.C. He stated in paragraph – 1 that before recording his statement, he had warned the appellant and said that his statement may be used against him. He further stated that at the time of recording statement, no police official was present. He stated that the statement of Rajesh Sah (appellant) was voluntary. After recording his statement, he had read over his statement and in the bottom, he gave his certificate with a signature. He proved the statement recorded under Section 164 of the Cr.P.C., as **Ext. 7**, whereas, he proved his certificate as **Ext. 8**. In cross-examination, though he had stated that accused was produced before him by one Peshkar (Bench Clerk), he was not aware about name of that Peshkar nor he was aware as to whether the Peshkar was of complaint file or G.R. Case. He stated that perhaps the said person was carrying “*Hathkari*”. He further accepted that in court he was brought by constable. He accepted in paragraph – 2 that in his certificate, he had not stated as to at what time he had warned



accused and thereafter, within what time, he has recorded his statement. He has further stated that he was not recollecting as to whether he had asked the accused as to whether he was threatened for making statement or not. He accepts that no such thing was written by him. He has even stated that he had not asked the accused as to whether he was assaulted by the police or not.

12. P.W.-10 Sri Ashok Kumar Singh, who at the relevant time was posted as Judicial Magistrate and as per the order of the Chief Judicial Magistrate on 04-09-1991, in Sub-Divisional Hospital, Motihari, he conducted Test Identification Parade, in which, appellant Rajesh Sah and one co-accused Bhullan Sahani were produced for identification parade. Though, number of witnesses were present to identify, only informant Shambhu Nath Rai (P.W.- 7) could identify one accused i.e. Rajesh Sah/appellant. This witness proved the Test Identification Parade, which was marked as **Ext. 9**.

13. P.W.-11 Rajendra Prasad was an Advocate's Clerk and to the reasons best known to the prosecution, this witness has come forward to prove the *post-mortem* examination report, which was got marked as **Ext. 6**.

14. P.W.-8 Sri Harendra Prasad Singh on 07-06-1991



was officer incharge of Mufassil Police Station and he had received telephonic information regarding one person lying injured in Sadar Hospital. He obtained O.D. Slip from police station and thereafter, recorded Station Diary Entry No. 125 dated 07-06-1991 and at about 10:00 P.M., he reached Sadar Hospital on the same date. At that very time, the injured had already died and he recorded the *fardbeyan* of informant Shambhu Nath Rai, which was already got exhibited as **Ext. 1** earlier by P.W.- 6. He prepared inquest report, which was marked as **Ext. 4** and thereafter, he prepared formal F.I.R., which was marked as **Ext. 2**. Subsequently, he went to the place of occurrence and inspected the place of occurrence. In paragraph – 4, he described about the place of occurrence and stated that on pitch road he had noticed blood-stain and at the place of occurrence, he also found one cycle and one bag of rice. In paragraph – 5 of his deposition, he stated that on 10-06-1991, he arrested the appellant who confessed his guilt and thereafter, his statement under Section 164 of the Cr.P.C. was got recorded. In paragraph – 8 of his cross-examination, he stated that on 10-06-1991 at 4:00 A.M. in the morning, he arrested the appellant Rajesh Sah and on 11-06-1991, he was forwarded to the court. He stated that on secret information, he



had arrested Rajesh (appellant). He further accepted that from the house of the appellant, no incriminating articles were seized. In paragraph – 9, he denied the suggestion that after the arrest of the appellant in police station itself he was got identified.

15. Besides placing aforesaid oral evidences, Sri Verma, learned senior counsel for the appellant has also placed **Ext. 7** i.e. statement of the appellant recorded under Section 164 of the Cr.P.C. On going through **Ext. 7**, it is evident that though he had stated that he was with other accused persons prior to the occurrence, he had categorically stated that he was not present at the time of occurrence. Meaning thereby that the confession was not inculpatory. Moreover, from his confession, it is difficult to come to a conclusion that the appellant had admitted that he was one of the participant in the occurrence. Besides this, the confession of the appellant i.e. **Ext. 7** is not required to be taken note of considering the fact that in the entire statement recorded under Section 164 of the Cr.P.C., the learned Judicial Magistrate has not at all indicated as to whether before recording his confession, the appellant was warned and informed that such statement may be used against him, however; the learned Magistrate had tried to justify the same in



the certificate, which was recorded in the bottom of statement recorded under Section 164 Cr.P.C. The Court is of the opinion that such explanation may not serve the purpose. Moreover, it has not at all been indicated that exactly at what time the appellant was produced before the learned Magistrate, at what time he was warned and as to whether he was given any cooling time or time to think over the matter.

16. So far as Test Identification Parade chart is concerned, even though the informant, as alleged, had identified the appellant in Test Identification Parade, since the informant (P.W.-7) had not identified the appellant in the dock, rather in specific term after seeing all the seven accused persons, he has said that amongst them, the person, who was identified in the T.I.Parade, was not present, obviously, identification in such Test identification Parade has got no relevance. Moreover, it is a fact that the appellant was arrested on 10-06-1991 and T.I.P. was done after about three months from the date of his arrest and as such, suggestion given by Sri Verma, learned senior counsel for the appellant that in the meanwhile, there was possibility to show the face of the appellant or got him identified by the witnesses before Test identification Parade may not be ruled out.



17. In the present case, except confessional statement and Test Identification Parade report, there was only one evidence, that is the evidence of P.W.-7 (informant), who himself has not identified the appellant during the trial in the dock and as such, the prosecution case appears to be completely doubtful.

18. Accordingly, by way of extending the benefit of doubt, the impugned judgment of conviction dated 21-05-1993 and sentence dated 22-05-1993 passed in Sessions Trial No. 348/18 of 1992 by Sri J. Ram, learned 1st Additional Sessions Judge, Motihari, East Champaran is, hereby, set aside.

19. The appeal is allowed.

20. Since the appellant is already on bail, he is discharged from the liability of his bail-bond.

(Rakesh Kumar, J.)

(Mohit Kumar Shah, J.)

Anay

AFR/NAFR	NAFR
CAV DATE	N/A
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