

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.570 of 2013

Arising Out of PS.Case No. -23 Year- 1992 Thana -GHOSBARI District- PATNA

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1. Sadhu Ram S/O Late Kapil Ram Resident of Village- Tirmuhan, P.S.- Ghoswari, District- Patna
 2. Bhuna Ram S/O Late Kapil Ram Resident of Village- Tirmuhan, P.S.- Ghoswari, District- Patna
 3. Ramdeo Ram S/O Late Prasadi Ram Resident of Village- Mohanpur, P.S.- Ghoswari, District- Patna
 4. Bharosi Ram S/O Late Prasadi Ram Resident of Village- Mohanpur, P.S.- Ghoswari, District- Patna
 5. Arjun Ram S/O Late Singho Ram Resident of Village- Mohanpur, P.S.- Ghoswari, District- Patna
 6. Kailash Ram S/O Late Saukhi Ram Resident of Village- Mohanpur, P.S.- Ghoswari, District- Patna
 7. Rajo Ram S/O Sri Siyaram Ram Resident of Village- Tirmuhan, P.S.- Ghoswari, District- Patna
 8. Sunil Ram S/O Sri Harkhit Ram Resident of Village- Tirmuhan, P.S.- Ghoswari, District- Patna

.... Appellants

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant/s : Mr. Ajay Kumar Thakur with Mr. Nilesh Kumar, Advocates
For the Informant : Mr. Manoj Kumar Singh with Kumari Anamika Singh, Advocates
For the Respondent/s : Mr. Binod Bihari Singh, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

CAV JUDGMENT

Date: 23.6.2017

This appeal is directed against the judgment dated 29.7.2013 and order dated 1.8.2013 passed by Sri Arvind Kumar Thakur, Additional District & Sessions Judge-2nd, Barh, Patna, by which he has convicted the appellants under Section 364 of the Indian Penal Code (hereinafter to be referred as 'the I.P.C.') and acquitted them from the charges under Section 379/411 of the I.P.C. and



sentenced the appellants to undergo R.I. for the period of ten years under Section 364 of the I.P.C.

2. Ghoswari P.S. Case No.23 of 1992 was instituted under Section 364 & 379/411 of the IPC on the basis of fardbeyan of P.W.7 (Rana Mahto) and the prosecution story as per fardbeyan is that he along with Balmiki Mahto, Jaldhari Mahto, Uchit Mahto, Ganouri Mahto, Munirak Mahto and four children were coming from village Nathunpur after performing '*rukhsadi*' of his nephew. At about 4.30 P.M., they were at some distance from Nakata Pool, two persons riding on horse, came near bullock cart and they were armed with Rifle, out of whom one was recognized as Rajo Ram Dharhi of village Trimohani and another was said to be Lalanwa Dharhi and they stopped them and abducted Balmiki Mahto and Jaldhari Mahto. Further prosecution story is that miscreants told to send Shiv Narayan Mukhiya, then they would release the abducted person and if the police is informed, they will be shot dead. Further prosecution case as per ferdbeyan is that besides two miscreants, Bharosi Ram, Ram Deo Ram, Arjun Ram, Kailash Ram, Bhuna Ram, Sadhu Ram and Sunil Ram armed with Pistols were also present near '*Pain*' for helping them and they took Balmiki Mahto and Jaldhari Mahto towards east and one person went away, taking the horse of Jaldhari Mahto. Subsequently, informant came at Trimohani Police Camp; where his



statement was recorded.

3. On the basis of aforesaid statement, formal F.I.R. was drawn up and after investigation, the charge sheet has been submitted altogether against 08 accused persons. It further appears that the Additional Chief Judicial Magistrate, Barh, Patna, accordingly took cognizance of the offence and the case was committed to the court of Sessions, which ultimately came to the file of Sri Arvind Kumar Thakur, Additional District & Sessions Judge-2nd, Barh, Patna for trial and disposal.

4. In this case charges have been framed under Sections 364 & 379/411 of the IPC against all the appellants upon which the appellants had pleaded not guilty.

5. After conclusion of trial, the appellants were convicted under Section 364 IPC and sentenced to R.I. for ten years. However, all the appellants have been acquitted from the charges under Section 379/411 of IPC.

6. Being aggrieved by the above judgment and order, the present appeal has been filed on behalf of the appellants.

7. Main contention of the appellants is that P.W.7, Rana Mahto, is the informant of the case and he claims himself as an eye-witness to the occurrence. However, evidence of P.W.2, Uchit



Mahto in paragraph-4 clearly shows that when he reached village he met Rana Mahto (P.W.7) and Awadhesh Kumar (P.W.6) and narrated the entire story and also narrated about the kidnapping of two persons and asked them to inform the police and if the evidence of P.W.2 is to be believed, P.W.7, Rana Mahto and P.W.6, Awadhesh Kumar, do not appear to be eye-witnesses to the occurrence, as such, the very initiation of the prosecution on the basis of statement of P.W.7 does not appear to be free from reasonable doubts.

8. It has further been submitted that as per FIR, appellant No.7 Rajo Ram and one Lalan Dharhi had abducted Jaldhari Mahto and Balmiki Mahto and F.I.R. shows that other accused persons were present at the '*pian*' armed with Pistol and no overt act has been alleged against any of the aforesaid appellant but P.W.7, who is the informant of the case, has also stated in his evidence about active participation of the other appellants and similarly other witnesses have stated about active participation of the other appellants, which is apparently not the prosecution case and it is an improvement in prosecution case and in such a situation, non-examination of I.O. in this case causes serious prejudice to the defence.

9. Further submission of learned counsel for the appellants is that as per evidence of P.W.7 fardbeyan was recorded on



12.3.1992, however, formal FIR portion, clearly shows that the aforesaid FIR has been received by ACJM on 16.3.1992, i.e., after four days of the lodging of FIR and that clearly creates a shadow of doubt. It has also been submitted that it is established principle that delay in sending the FIR creates serious doubt about the prosecution version as there is always a chance of manipulation in the FIR before sending it to the court and on that ground itself the whole prosecution case is not free from serious doubt. It has also been submitted that no explanation has been given for such delay, rather I.O. has not been examined in this case and in such a situation Hon'ble Supreme Court has held in so many cases, i.e., **Thanedar Singh vs. State of M.P. : (2002) 1 SCC 487, State of Rajasthan vs. Teja Singh and others : (2001) 3 SCC147, Arjun Marik and others vs. State of Bihar : 1994 Supp (2) SCC 372 and Meharaj Singh vs. State of U.P. : (1994) 5 SCC 188** that adverse inferences for not explaining the delay in sending FIR have to be drawn against the prosecution. It has also been submitted that sending of copy of FIR forthwith to the Magistrate is essential in order to avoid improvement in prosecution story and introduction of any distortion by deliberation and consultation and secondly to enable learned Magistrate to have a watch towards progress of the investigation. Admittedly in this case there is delay of four days in sending FIR and no explanation has been



given for the same.

10. On the other hand, learned APP has argued that there are consistent evidence of the eye-witnesses who support the prosecution story of abduction of Jaldhari Mahto and Balmiki Mahto by the appellants and thereafter both the victims were traceless even after more than seven years of the occurrence and, as such, there shall be presumption that both had been killed. It has also been argued that there is nothing on the record to show that the judgment is not sustainable in the eye of law.

11. In the aforesaid background this Court has to scrutinize the evidences and other materials available on record.

12. On behalf of prosecution altogether seven witnesses have been examined in this case and they are P.W.1 Bishundeo Singh, P.W.2 Uchit Mahto, P.W.3 Munirak Mahto, P.W.4 Suresh Singh, P.W.5 Dinesh Singh, P.W.6 Awadhesh Kumar and P.W.7 Rana Mahto (informant). However, out of the seven witnesses except P.Ws. 2, 3, 6 & 7 other witnesses have been declared hostile as they have not supported the prosecution case, as such, their evidences are not of much importance for just decision of the case.

13. Apart from the aforesaid oral evidence, ocular evidence, following documents have been brought as exhibits in this case, they are signatures of the witnesses on the fardbeyan as Exts. 1,



1/1 and 1/2.

14. P.W.7 is the informant in the present case and as per his evidence, he was coming after roksadi of nephew of Charitar Mahto on 12.3.1992 at about 4.30 P.M. and along with him Jaldhari Mahto, Balmiki Mahto, Uchit Mahto, Ganouri Mahto, Awadhesh Mahto, Munirak Mahto and four children were there. His evidence also shows that Uchit Mahto, Ganouri Mahto and Munirak were on bicycle and Balmiki Mahto, Awadhesh Mahto and four children were on bullock cart and Jaldhari Mahto was on horse. His evidence shows that when he reached near Nakta Pool some persons were sitting in “pian” and he identified Rajo Ram, Lalan Dharhi, Bharosi Ram, Ramdeo Ram, Arjun Ram, Kailash Ram, Bhuna Ram, Sadhu Ram and Sunil Ram. Lalan Dharhi and Rajo were armed with rifle and rests were armed with pistol. He has also stated that Rajo and Lal Dharhi had surrounded him and detained them for 10-20 minutes. His evidence in chief further shows that on the plea of Balmiki they were left and they were told to call Shiv Narayan Mukhiya and if the police will be informed they will kill Balmiki and Jaldhari. His evidence in chief further shows that Bharose Ram has caught his brother Balmiki and Ramdeo Ram has caught Jaldhari Mahto and they had taken them towards east. His evidence in chief also shows that he has gone to Mukhiyajee and asked him to come but he has not come. However, so



far participation of Bharose Ram and Ramdeo Ram are concerned, no such statement has been given by this witness in his first version before police and that clearly appears to be an after thought. This witness has been cross examined also and in his cross examination this witness has stated that he tried to flee away and even Balmiki and Jaldhari tried to flee away but they have been caught and abused. His evidence in cross examination also shows that none has come for their help and they have not gone behind Balmiki and Jaldhari. His evidence in cross examination in paragraph-5 also shows that two days prior to the occurrence there was firing between “Dharhi” and “Mahto”. His attention has been drawn towards his first statement made before police in paragraph-7 and he has stated that he has stated in fardbeyan that at the time of occurrence near pine Bharose Ram, Ramdeo Ram, Arjun Ram, Kailash Ram, Bhuna Ram, Sadhu Ram and Sunil Ram were present. From the cross examination it appears that there is nothing in his evidence, except some minor discrepancies and improvement to doubt his credibility about being eye-witness to the occurrence.

15. P.W.2 is another eye-witness to the occurrence and it has been argued on behalf of the appellants that evidence of P.W.2 in cross examination in paragraph-4 clearly shows that when they reached the village they met Rana Mahto and Awadhesh Mahto and



they informed that two persons were abducted by accused persons and that certainly creates some doubt about presence of P.W.7 at the time of occurrence. However, on close scrutiny of evidence of P.W.2 it appears that he has stated in his evidence in chief that when he reached Nakta Pool his bullock cart was surrounded and in the bullock cart Awadhesh, Rana Mahto and others were there and he has also stated that Jaldhari and Balmiki have been abducted and accused persons were armed with some articles. No doubt this witness has stated about the presence of appellants Ramdeo Ram, Bharose Ram, Kailash Ram, Rajo Ram, Arjun Ram and Bhuna Ram. However, as I have stated above, prosecution story, as made in fardbeyan, only shows that only Rajo Ram and Laldharhi had abducted Jaldhari and Balmiki and so far other appellants are concerned, FIR itself shows that they were present in the "Pian" and no overt act has been alleged against other appellants. As such, so far evidence of this witness about the participation of other appellants is concerned, the same seems to be doubtful in nature. His evidence in cross examination also shows that there was enmity between "Dharhi" and "Mahto" and no hulla was raised by them.

16. P.W.3, who also claims to be an eye-witness to the occurrence, has stated in his evidence in chief that Balmiki Mahto and Jaldhari Mahto were abducted. However, he has also named



appellants Lalan Ram, Bharose Ram, Ramdeo Ram, Arjun Ram and Kailash Ram and they were armed with rifle and pistol. This witness has also stated in his cross examination that he has not informed about the occurrence to any villager of Golihari and informed Rana Mahto and Awadhesh Mahto about the occurrence at Mohanpur and thereafter he left the place. His evidence further shows that he had asked them to lodge a case to the police outpost.

17. P.W.6, who also claims to be an eye-witness to the occurrence, has supported the prosecution version about the abduction of Jaldhari Mahto and Balmiki Mahto and also has stated that they have asked them to send Shiv Narayan Mukhiya then only the abducted persons will be left. This witness has also identified Rajo Ram, Lalan Dharhi and other accused persons but has stated that Lalan Dhari and Rajo Dhari were on horse and they have taken Balmiki Mahto and Jaldhari Mahto towards east. This witness has also been cross examined and in his cross examination, he has stated that there was no hulla gulla made during course of occurrence and even on way to his village and after coming there he informed police but he does not know his name. Even in spite of rigorous cross examination, this witness withstood the list of cross examination and supported the prosecution version of abduction of Balmiki Mahto and Jaldhari Mahto.



18. Considering the evidences, as discussed above, it appears that there are sufficient cogent evidences available on the record to show that Jaldhari Mahto and Balmiki Mahto had been abducted. No doubt, witnesses have stated the name of several other persons but the evidence of P.W.7 shows that it was Rajo Ram and Lalan Dhari, who have abducted them and so far implication of other appellants by the witnesses is concerned, that appears to be exaggeration as initial prosecution story is that they were present in the “pian”. So far argument of learned counsel for the appellants that there is delay in sending FIR and that creates false implication of the appellants and further there is no evidence that when Jaldhari Mahto and Balmiki Mahto were abducted they raised any hulla and evidence further shows that Jaldhari Mahto and Balmiki Mahto had been detained on condition to send Shiv Narayan Mukhiya, as such, it cannot be said that the aforesaid persons were detained with an intention of murder or disposed of their bodies and, as such, no case is made out under Section 364 IPC. No doubt, there is delay in sending the FIR of four days to the Magistrate and even I.O. has not been examined in this case and this is serious lapse on the part of the prosecution but considering the fact that cogent sufficient evidence of eye-witnesses are available on the record, which clearly shows that Balmiki Mahto and Jaldhari Mahto had been abducted and there is nothing in their evidence to show that they have falsely been



implicated the appellants in this case. No doubt there are some developments and some discrepancies in their evidence but when the occurrence is of the year 1993, such type of discrepancy and development is bound to occur in such type of cases. As there is enmity between the parties from before, as such, addition of some names in the case cannot be ruled out but on that ground, consistent prosecution evidence of abduction of Jaldhari Mahto and Balmiki Mahto cannot be brushed aside.

19. Further defence plea on behalf of the appellants is that no hulla was raised nor any steps were taken to inform the person from neighbouring village is concerned, it clearly appears that the appellants were variously armed and the evidences of witnesses do not that they were armed with fire arms or not ? Further there is no evidence to show that there was any village in vicinity of place of occurrence, as such, in such a situation, if no hulla was raised by the prosecution side that cannot be a ground of disbelieving the prosecution story. On the other hand, the evidences are available on the record to show that when they came to the village, they informed police. So far delay in sending FIR is concerned, it appears from prosecution evidence that statement of P.W.7 was recorded at police outpost in his village, naturally it might have been sent to the police station and from there to the Magistrate and in such a situation, there



is delay in sending FIR to the Magistrate, which cannot discredit the consistent evidence of prosecution witnesses.

20. Further argument on behalf of the appellants is that in this case, charge is framed under Section 364 IPC and conviction is also under Section 364 IPC but dead bodies of Jaldhari Mahto and Balmiki Mahto have not been recovered and moreover there is nothing on the record to show the intention of the appellants so as to kill the abducted persons rather the evidence shows the intention to call Shiv Narayan Mukhiya and, as such, conviction of the appellants under Section 364 IPC is bad in law.

21. In this connection Section 108 of the Evidence Act may be usefully quoted, which reads as follows :

“108. Burden of proving that person is alive who has not been heard of for seven years.—1[Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is 2[shifted to] the person who affirms it.—1[Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is 2[shifted to] the person who affirms it.”

22. From the evidence it is clear that there is prove of abduction of two persons for the last 20 years. No doubt their dead bodies have not been found up-till-now, as such, according to Section 108 of the Evidence Act like burden of providing that person is alive



or dead and inference of murder can safely be drawn in their respect and in such a case it would be necessary to prove the corpus delicti rather onus is upon the prosecution to prove otherwise and the aforesaid view found support from the decision of the Apex Court in the case of ***Badshah & Ors.- Vrs.- State of Uttar Pradesh reported in (2008) 3 SCC 681.***

23. In such a situation, when the both abducted persons are still traceless, they shall be presumed to be dead and as the evidence clearly shows that the appellants had abducted them, hence onus is upon the appellants to prove it otherwise.

24. Considering the entire discussions made above, there are sufficient cogent and reliable evidence available on the record to show that Balmiki Mahto and Jaldhari Mahto had been abducted and they are still traceless and, as such, legal presumption is that they are dead.

25. So far participation of appellants is concerned, P.W.2 has named the accused persons, including appellant Nos. 2, 3, 4, 5, 6 & 7, whereas P.W.3 has named appellants 3, 4,5 & 7 and P.W.7 has named appellants 7, 4 & 3, whereas P.W.6 has named all the appellants but he has stated that Lalan Dharhi abducted them. There is enmity admitted between the community “Dharhi” and “Mahto” and initial prosecution story shows that it is appellant Rajo



Ram (appellant no.7) and Lalan Dharhi that they have abducted Balmiki Mahto and Jaldhari Mahto and other appellants were also present near place and evidence of P.W.7, who is informant in this case, also shows about active participation of Rajo Ram and Lalan Dharhi though he has named other appellants also but that is clearly an improvement of prosecution story as against initial prosecution story and informant has not also alleged about active participation of other appellants except Rajo Ram.

26. In view of the discussions made above, so far conviction of the appellant Rajo Ram under Section 364 IPC is concerned, is upheld. However, so far conviction and sentence of other appellants is concerned, in the facts and circumstances of the case, they are entitled for the benefit of doubt.

27. In view of discussions made above, conviction and sentence of the appellants except appellant Rajo Ram is concerned, is set aside. Appellant Rajo Ram along with other appellants were sentenced to undergo rigorous imprisonment for 10 years. However, considering the facts and circumstances of the case as also considering the fact that dead bodies were not recovered in this case and at the time of judgment accused Rajo Ram was aged about 33 years and he is at present must be aged about 37 years and it further appears from perusal of the record that after the judgment he has remained in



custody for about more than three years 10 months and during trial he has remained in custody for three months. Hence he has already remained in custody for more than four years. Considering the young age of appellant Rajo Ram, to my opinion, ends of justice will be served if his sentence is reduced to the period already undergone by him. As such, his sentence is reduced to the period already undergone.

28. Accordingly, this appeal is partly allowed. Conviction and sentence of all appellants except Rajo Ram is set aside. So far conviction of appellant Rajo Ram is concerned, the same is affirmed and sentence is reduced to the period already undergone by him.

29. Office is directed to communicate the judgment to the court concerned forthwith along with the lower court records.

(Vinod Kumar Sinha, J)

chn/- spal

AFR/NAFR	
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