

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.250 of 2010

(Against the Judgment of conviction dated 06.02.2010 and Order of sentence dated 10.02.2010 passed by the learned Additional District and Sessions Judge-cum-F.T.C.-IV, Kaimur, Bhabua in Sessions Trial No. 42 of 2003/130 of 2009).

- =====
1. Indradev Choubey, son of late Ram Avatar Choubey
 2. Laxmikant Choubey, Son of Indradev Choubey
 3. Kanhaiya Choubey, S/o Udawant Choubey
 4. Mrityunjay Choubey @ Nachikar Choubey, son of late Umashankar Chubey
All resident of village- Kurai, P.S.- Chainpur, District- Kaimur (Bhabhua).
- Appellant/s

Versus

State of Bihar

.... Respondent/s

with

=====

Criminal Appeal (DB) No. 237 of 2010

=====

Dhananjay Choubey, son of Umashankar Choubey, resident of village- Kurai, P.S.- Chainpur, District- Kaimur at Bhabua

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

=====

Appearance :

(In CR. APP (DB) No.250 of 2010)

For the Appellant/s :	Mr. Manan Kumar Mishra, Sr. Advocate. Mr. Kamal Nayan Choubey, Sr. Advocate. Mr. Ashok Kumar Garg, Advocaet. Mr. Vishwajeet Kumar Mishra, Advocate.
For the State :	Mr. A.K.Sinha, A.P.P.
For the Informant :	Mr. Tribhuwan Narayan, Advocate.

(In CR. APP (DB) No.237 of 2010)

For the Appellant/s :	Mr. Ram Adya Singh, Advocate. Mr. Rajni Kant Dubey, Advocate.
For the State :	Mr. A.K.Sinha, A.P.P. Mr. S.C.Mishra, A.P.P.
For the Informant :	Mr. Tribhuwan Narayan, Advocate.

=====

CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

and

HONOURABLE MR. JUSTICE ARUN KUMAR

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH)

Date: 03-05-2017



Heard learned counsel for the parties.

2. Both the appeals have been preferred against judgment and conviction dated 06.02.2010 and order of sentence dated 10.02.2010 passed by the learned Additional District and Sessions Judge-cum-F.T.C.-4, Kaimur, Bhabua in Sessions Trial No. 42 of 2003 /130 of 2009 whereby appellant Mrityunjay Choubey has been sentenced to life imprisonment under Section 302 of the Indian Penal Code, Dhananjay Choubey, Kanhaiya Choubey, Laxmikant Choubey and Indradeo Choubey have been sentenced to undergo life imprisonment under Sections 302/149 of the Indian Penal Code as well as to pay a fine of Rs. 25,000/- and in default of payment of fine to undergo additional rigorous imprisonment for five months. For the offence under Section 27 of the Arms Act, Mrityunjay Choubey and Dhananjay Choubey sentenced to undergo rigorous imprisonment for seven years along with a fine of Rs. 5000/- each and in default of payment, to undergo additional rigorous imprisonment for five months each. For the offence under Section 307 of the Indian Penal Code convict Dhananjay Choubey sentenced to undergo life imprisonment along with a fine of Rs. 3000/- and in default of payment, to undergo additional rigorous imprisonment for three months. However, all the sentences have been directed to run concurrently.



3. The prosecution case, as made out in the *fardbeyan* of Sidheshwar Choubey (PW-9) on 05.05.2002 at about 1:00 P.M. at his house in his village Kurai, P.S.- Chainopur, District-Kaimur, recorded by S.I. Rajeshwar Sharma(PW-13), Chainpur P.S. , in short, is as follows:

(a) The informant stated that his old residential house is situated contiguous to the residential house of accused Mrityunjay Choubey @ Nachikar Choubey. On 04.05.2002, Mrityunjay Choubey @ Nachikar Choubey was trying to fix his door which opened on the land of his neighbour Bachchan Pandey which was situated just next to the land of prosecution side, to which informant's brother Madho Choubey protested. But, Mrityunjay Choubey @ Nachikar Choubey was insistent on opening the door on the land. When the informant who was around, learnt about the highhandedness, he too questioned Mrityunjay Choubey @ Nachikar Choubey as to why he is behaving so, whereupon Mrityunjay Choubey @ Nachikar Choubey got angry with him. In the meantime, Dhananjay Choubey, brother of Mrityunjay Choubey, came and threatened them with dire consequences. Thereafter, the informant along with his brother Madho Choubey returned to their house. However, Mrityunjay Choubey remained annoyed. On the next day i.e., on 05.05.2002 at 10:00 A.M., when the informant was



tying his she-buffalo, he saw Mrityunjay Choubey armed with single barrel gun, Kanhaiya Choubey armed with country made pistol, Indradeo Choubey and Laxmi Choubey armed with *Lathi*, Dhananjay Choubey armed with country made pistol advancing towards their house from east, Indradeo Choubey and Dhananjay Choubey exhorted to attack, whereupon all the accused entered into his house. Mrityunjay Choubey shot at his brother Parmanand Choubey, sitting on the Chawki, with a single barrel gun, who succumbed to the injury. Dhananjay Choubey also opened fire which hit his wife Leelawati Devi on her right leg and left side of neck. On hearing firing shots, his neighbour Harihar Dhobi rushed towards his house upon whom Kanhaiya Choubey opened fire which caused injury on his neck. On account of fear, the informant hid himself behind the western wall. Soon thereafter, the accused persons came out of his house hurling abuses. A number of neighbours namely Tejwali Choubey, Ramashish Choubey, Birbali Choubey, etc. arrived who too had witnessed the occurrence.

4. On the basis of *fardbeyan* of the informant, the police registered Chainpur P.S. Case No. 40 of 2002, dated 05.05.2002 under Section 302/34 of the Indian Penal Code and Section 27 of the Arms Act against all the FIR named accused persons. The police, in course of investigation, prepared inquest report of the deceased, and



inspected the place of occurrence on the second day and also took statement of a number of witnesses. The police also sent the dead body of the deceased for postmortem. The police initially submitted first charge sheet against two accused persons namely Mrityunjay Choubey @ Nachikar Choubey and Kanhaiya Choubey on 04.10.2002 and second charge sheet on 08.01.2003 against Indradeo Choubey, Laxmi Choubey. The police, however, did not submit charge sheet against accused Dhananjay Choubey accepting his plea of alibi. Dhananjay Choubey claimed that he was released from Bahraich (UP) on 03.05.2002 and he could reach Gajipur in the night at 21.45 on 05.05.2002 as such he could not have participated in the crime at the place of occurrence situated in Kaimur at Bhabua.

5. On receipt of the charge sheets against all other accused, except, Dhananjay Choubey, the learned Magistrate took cognizance of the offence and committed the case to the court of sessions for trial. The trial court framed charge under Sections 302 of the Indian Penal Code and 27 of the Arms Act against Mrityunjay Choubey @ Nachikar Choubey and against rest of the accused persons under Sections 302/149 of the Indian Penal Code. Dhananjay Choubey and Kanhaiya Choubey were further charged under Section 307 of the Indian Penal and 27 of the Arms Act. Accused Laxmi Kant Choubey and Indradeo Choubey were charged under Sections



147 of the Indian whereas Mrityunjay Choubey @ Nachikar Choubey and Kanhaiya Choubey were charged under Sections 148 of the Indian Penal Code. All the accused pleaded not guilty and claimed to be tried.

6. In course of trial, accused Dhananjay Choubey was also summoned under Section 319 Cr.P.C. to face trial under Section 302/149 of the Indian Penal Code and Section 27 of the Arms Act.

7. The prosecution, in support of its case, examined as many as 14 witnesses. Out of 14 prosecution witnesses, PW-4, 5, 9 and 11 have claimed to be the eye witness, PW-6, 8, 10 and 12 have claimed to have seen the accused fleeing after the occurrence, PW-1 Dr. Kaushal Kishore Prasad Srivastava, who conducted the post-mortem examination on the dead body of the deceased Parmanand Choubey, opined that the death was caused due to fire arm injury, PW-14, Dr. Arun Kumar has examined the two injured namely Harihar Dhobi (PW-3) and Leelawati Devi (PW-11), PW-3 Harihar Dhobi was declared hostile as in his evidence he has stated that he did not see as to who had opened fire upon him, PW-13 Rajeshwar Sharma is the investigating officer of this case.

8. The case of the defence, as per the statement recorded under Section 313 of the Cr.P.C. as well as from the mode of cross-examination, is one of false implication on account of admitted



enmity with the prosecution side. In nutshell, the case of the defence was that the prosecution side committed the murder of Parmanand Choubey to usurp his property as he was issueless and has falsely implicated the accused persons in order to shift the crime on them. However, the defence has examined as many as 08 witnesses in order to demonstrate that the prosecution has got the deceased killed near Shitla Mata Mandir at Neem Tree.

9. The trial court, after considering the materials on record, convicted accused Mrityunjay Choubey @ Nachikar Choubey under Section 302 of the Indian Penal Code and rest four accused persons under sections 302/149 of the Indian Penal Code. However, accused Kanhaiya Choubey was acquitted of the charge under Section 307 of the Indian Penal Code. All the accused persons were acquitted of the charge under Section 147 and 148 of the Indian Penal Code.

10. Heard Mr. Kamal Nayan Choubey, learned senior counsel appearing on behalf of appellant Kanhaiya Choubey as well as Mr. Manan Kumar Mishra learned senior counsel on behalf of appellants Mrityunjay Choubey, Indradeo Choubey and Laxmikant Choubey and Mr. Ram Adya Singh learned counsel appearing on behalf of the appellant Dhananjay Choubey, Mr. Ashwani Kumar Singh learned A.P.P. for the State and Mr. Tribhuwan Narayan



learned counsel appearing on behalf of the informant.

11. Learned counsels appearing on behalf of the appellants jointly submit that the prosecution has not been able to establish the genesis of occurrence and motive for committing the murder of Parmanand Choubey. It is submitted that even as per prosecution case, Mrityunjay Choubey @ Nachikar Choubey, one of the accused, was opening his door in the land of Bachchan Pandey with which the prosecution side admittedly did not have any concern. The aforesaid Bachchan Pandey has not been examined. It was next submitted that no one including the informant and the inmates of the house could have seen the occurrence. As per the informant, he was watching the occurrence from the western side of the house, but the evidence of the witnesses was consistent on the point that the door on the western side was closed, as such he could not have seen the occurrence from outside which was taking place inside the house. Similarly, Harihar Dhobi, who had sustained injury, stated that he has not seen as to who had assaulted him. It is next submitted that all the witnesses are own family members and interested witness and no independent witness has been examined in this case. Furthermore, it is the specific case of the defence that the deceased was issueless and the informant and his other brothers, in order to grab his property, got him killed by some unknown criminals. Furthermore, the



prosecution has failed to establish the place of occurrence, whether it is Dugaha in the house or whether it is a place near the Neem tree outside the house in front of Shitala Mata Mandir.

12. Apart from the common grounds taken by the appellants, Mr. Kamal Nayan Choubey, learned senior counsel appearing on behalf of the appellant Kanhaiya Choubey, states that there is no allegation against him that he either surrounded or assaulted the deceased. He specifically argued that no overt act has been alleged against the appellant Kanhaiya Choubey. Similar stand has been taken on behalf of the appellants Indradeo Choubey, Laxmikant Choubey and Dhananjay Choubey that they too did not participate in any assault on the deceased. It was additionally argued on behalf of appellant Dhananjay Choubey that he was not present in his village rather he was relieved from Bahraich only on 03.05.2002 and reached Gajipur in the night on 05.05.2002 at 23:45 P.M., whereas the occurrence took place at 10:00 A.M. in the morning of 05.05.2002. It has been argued on behalf of Mrityunjay Choubey that there was no motive for him to kill a disabled person and even if the prosecution case has to be believed, the altercation took place between Madho Choubey and the informant and the deceased was nowhere in the picture. It is also submitted that by not making Manju Devi, the wife of the deceased, a witness, the prosecution has



withheld one of the most material witnesses in this case, who could have narrated the theory. Besides this, the doctor, in the post-mortem examination, has found swelling on the neck, dark blood coming from mouth and upper portion of both lungs lacerated, which would demonstrate that the deceased was strangled and then shot dead, which is not the prosecution case.

13. On the other hand, Mr. Ashwini Kumar Sinha, learned A.P.P., has defended the impugned judgment of conviction and order of sentence against the appellants. He submits that the informant, in his evidence, has fully supported the prosecution case that the accused persons entered into the house and Mrityunjay Choubey opened fire, which killed the deceased Parmanand Choubey. He further stated that Dhananjay Choubey too opened fire which injured Leelawati Devi, who rushed towards the house after hearing the sound of gun shot. He submits that the other appellants, namely, Kanhaiya Choubey, Indradeo Choubey and Laxmikant Choubey also shared common object of committing murder of the deceased. Furthermore, Ramashish Choubey (PW-4) is an independent witness and lived in the neighbourhood of the prosecution side. He stated that he has witnessed the occurrence and there was no enmity in between this witness and the appellants. He further stated that Gujarati Devi (PW-5) is the mother of the



deceased.

14. We have heard learned counsel for the parties and perused the materials on record. We would now take up the grounds one by one raised by the appellants in their defence. Learned counsel appearing on behalf of the appellants argued that there was no motive or occasion for the appellants to kill Parmanand Choubey as there was no previous altercation or animosity with him. It was further argued that if any person would have been aggrieved by the action of the appellants for opening of the door on the land of Bachchan Pandey, it was Bachchan Pandey himself and no one else and thus there could be no motive for them to attack the prosecution side first.

15. In our view, the submissions of the defence is to be noticed to be rejected. It is the consistent case of the prosecution that on the previous date i.e., on 04.05.2002, altercation took place between Madho Choubey, the brother of the informant and Mrityunjay Choubey, over the matter of opening of the door on the land of Bachchan Pandey. The informant too came and sided with his brothers and also protested to the actions of the appellants over opening of the door on the land of Bachchan Pandey, which was adjacent to their land. In the meantime, Dhananjay Choubey, the brother of Mrityunjay Choubey also came and took the side of his



brother and threatened the prosecution side with dire consequences. On the very next day, i.e., on 05.05.2002 at about 10:30 AM, the accused persons variously armed came from the eastern side and entered into the house of informant. On seeing the accused persons, Madho Pandey hid himself in one of the rooms whereas the informant, seeing the accused persons, went towards the western side of his house, from where he witnessed the occurrence.

16. It is the further case of the prosecution that the accused persons shot at Parmanand Choubey, the brother of the informant, who was easy target because of his disablement. Since an altercation took place between the prosecution side and the appellants, just a previous day on the matter of opening of door on the land of Bachchan Pandey, it cannot be said that there was no motive or genesis for the appellants to commit assault on the prosecution side and in the process killed one of the inmates. Furthermore, Gujarati Devi (PW-5), the mother of the deceased, who was present in the house, too stated that the appellants committed the murder of her son Parmanand Choubey, as he wanted to transfer his land in favour of the appellants, as they used to feed and take care of him and his wife. No mother can free the real culprit of her own son and implicate someone who has not participated in the offence.

17. The defence has argued that the prosecution has not



been able to prove the place of occurrence as the police recovered the dead body near a Neem tree in front of Shitla Mata Mandir.

18. In our view, the submission of the appellants is bereft of merit and is fit to be rejected. It is the consistent case of the prosecution that Parmanand Choubey was shot dead in his house and thereafter the prosecution side along with some outsiders took the dead body near Neem tree, just in front of the house, near the Shitla Mata Mandir, as the deceased was a devotee of Shitla Mata and the temple was a private temple of the deceased where he used to offer his prayer and spent most of the time there.

19. The defence has argued that in fact, no one including the informant had seen the occurrence and they have projected themselves as eye witness to falsely implicate the appellants in this case. Learned counsel for the appellants submits that some of the witnesses have stated that door on the western side was closed from where the informant has claimed to have seen the occurrence. It is true that the informant stated that at the time of occurrence, the accused persons had come in the house from the front side of the house i.e., from western side and he was, at the relevant time, at the back side of the house. However, he stated that there was a door at the back side from which he saw the entire occurrence. It is true that the witnesses have stated that the door was closed, but none of the



witnesses have stated that the door was bolted from the inside and as such the informant could not have seen the occurrence from the door. The Investigating Officer, in his evidence, too stated that he too found the door on the western side open.

20. It is next submitted that no independent witness examined and the prosecution case is based on the evidence of family members. We find that the evidence of family members cannot be discarded, if it is otherwise worthy of pleadings. In the instant case, apart from the family members, one Ramashish Choubey (PW-4) has been examined as eye witness who is not related to the family members and is not inimical to the accused side.

21. The other argument of the defence is that post-mortem report does not support the prosecution case because as per the evidence of the witnesses, the appellants entered into the house and shot at the deceased, but the doctor has found swelling on the neck. It is relevant to state here that the doctor has not found any ligature mark on the neck of the deceased. Besides this, there is no finding of any ante-mortem injury on the neck of the deceased.

22. Now, we would take up the individual case of the appellants and the submissions made on their behalf, which we have dealt with under the common grounds taken on their behalf.

23. Mr. Kamal Nayan Choubey, learned senior counsel



appearing on behalf of the appellant Kanhaiya Choubey, submits that he is alleged to have open fire at Harihar Dhobi. However, Harihar Dhobi, in his evidence, stated that he had not seen as to who had shot at him and as such the trial court acquitted him of the charge under Section 307 of the Indian Penal Code. He submits that there is no evidence against this appellant that he shared common object with other accused persons to commit murder of Parmanand Choubey, as there is no specific overt act that he had participated in any manner in the commission of his murder.

24. On the other hand, learned counsel for the State and the informant stated that appellant Kanhaiya Choubey came along with all the accused persons, though he did not commit any overt act on the deceased, but he shared common object of committing the murder of Parmanand Choubey.

25. We find that as per the prosecution case, Kanhaiya Choubey was armed with pistol. He is alleged to have opened fire at Harihar Dhobi, but the court did not find it very reliable as Harihar Dhobi stated that he did not see as to who fired upon him. Furthermore, Leelawati Devi (PW-11), wife of the informant, in her cross-examination, too did not state that she saw as to who opened fire at Harihar Dhobi. It is very relevant to notice that this appellant was armed with pistol, still there is no allegation that he either



surrounded the deceased or opened fire on the deceased. As such, we are of the considered view that the prosecution has miserably failed to bring home the charge against the appellant Kanhaiya Choubey of sharing common object of committing murder of Parmanand Choubey, hence, we acquit him of the charge under Sections 302/149 of the Indian Penal Code. As the appellant Kanhaiya Choubey is on bail, he is discharged from the liability of his bail bonds.

26. Further, coming to the case of appellants Laxmikant Choubey and Indradeo Choubey, as per the FIR, they are said to be armed with *Lathi*. We find that there is no allegation of assault against them on the deceased or any one of the family members with *lathi*. As such, their case is on better footing than any of the other appellants and as such, we acquit them of the charge under Sections 302/149 of the Indian Penal Code. As both these appellants are on bail, they are discharged from the liabilities of their bail bonds.

27. On behalf of the appellant Dhananjay Choubey, learned counsel Mr. Ram Adya Singh, apart from the common grounds taken on behalf of the other appellants, has taken an additional plea of *alibi*. He submits that this appellant, at the relevant time of occurrence, was posted as Constable at Bahraich in Uttar Pradesh. He was relieved from his duty in the evening on 03.05.2002. He could reach Gajipur only in the evening on



05.05.2002. The occurrence took place on 05.05.2002 at 10:30 A.M in village Kurai under Chainpur Police Station in the District Kaimur, which is a border district with Gajipur District of the State of Uttar Pradesh. He submits that it is the common knowledge that the distance between both the places is about 80 Kms and the appellant could reach Gajipur in the night at 21:45 PM on 05.05.2002 and as such he could not have participated in the crime at the place of occurrence situated in Kaimur district. He further submits that the police had accepted the plea of *alibi* of Dhananjay Choubey and had not even sent up him for trial. He alternatively submits that there is no allegation that this appellant committed any assault on the deceased. The allegation against him is of opening fire at Leelawati Devi, which incidentally hit her neck causing simple injury.

28. In response to the arguments on behalf of the appellant Dhananjay Choubey, learned counsel for the State and the informant jointly submit that this appellant (Dhananjay Choubey) was relieved from Bahraich in the evening on 03.05.2002 and one day time is sufficient to reach Gajipur, which is also in the State of Uttar Prasad. They submit that the appellant, in fact, had first come to his village on 04.05.2002 and after committing the occurrence on the next morning at 10:30 A.M., he proceeded from there and gave



his joining in the night at 21:45 on 05.05.2002 on the same day. They submit that this appellant has tried to project that he straightway came to Gajipur from Bahraich, which is not the case.

29. It is well settled that where accused takes a plea of *alibi*, it is open upon him to prove the same beyond all reasonable doubt. In the instant case, witnesses, namely, Sidheshwar Choubey (PW-9), Ramashish Choubey (PW-4), Leelawati Devi (PW-11) and Gujarati Devi (PW-5), the mother of the deceased, all have consistently stated that the appellant Dhananjay Chaubey came along with his brother Mrityunjay Choubey, who fired at the deceased leading to his death. Hence, we are constrained to hold that the appellant Dhananjay Choubey has not been able to prove the plea of *alibi* beyond all reasonable doubt and as such, we decline to accept the plea of *alibi* set up by the appellant.

30. Now coming to the other aspect of the case, we find that this appellant too had not shot at the deceased. There is no allegation that he had committed any overt act on the deceased though he was armed with country made pistol. As such, it is difficult first to hold that he had shared common object of committing murder of Parmanand Choubey. Therefore, we acquit him of the charge under Sections 302/149 of the Indian Penal Code. We further find that the injured Leelawati Devi (PW-11) and the



informant (PW-9) specifically stated that when Leelawati Devi, on hearing gun sound, came, Dhananjay Choubey opened fire at her, which caused injuries on her neck and hand. As such, we find that the prosecution has been able to establish only the charge against this appellant under Section 307 of the Indian Penal Code. Therefore, taking into consideration that the injury caused by the appellant Dhananjay Choubey was simple in nature, we reduce his sentence to undergo 07 years rigorous imprisonment.

31. So far as appellant Mrityunjay Choubey is concerned, he is involved in the incident, which took place on 04.05.2002 and 05.05.2002. On 04.05.2002, the appellant was trying to fix a door which opened on the land of Bachchan Pandey. When the prosecution side protested, this appellant along with Dhananjay Choubey threatened the prosecution side with dire consequences. Just on the next day, i.e., on 05.05.2002, this appellant, along with other family members, came variously armed from the eastern side and entered into the house. It is alleged that this appellant opened fire on the deceased, who was sitting in *Dugaha*, an open space between the two rooms towards the western side of the house. The informant has reiterated the prosecution case in his evidence that this appellant shot at the deceased which led to his death. Gujarati Devi (PW-5), who is the mother of the deceased, stated that this appellant shot at



the deceased. Thereafter, he was taken to the Neem tree in front of the house, just near the Shitala Mata Mandir, where the deceased used to offer his prayer and Pooja etc. As per post-mortem report, the doctor, in his evidence, too opined that the deceased died on account of fire arm injury, which corroborates the prosecution evidence. As such, we are of the considered view that the prosecution has been able to prove the charge under Section 302 of the Indian Penal Code against this appellant. The charge under Section 27 of the Arms Act is also proved. We, accordingly, uphold the conviction and sentence awarded by the trial court, save and except, the fine amount for offence under Section 302 of the Indian Penal Code which is reduced to Rs. 5,000/- and in default, to undergo simple imprisonment for three months. No separate sentence is awarded for charge under Section 27 of the Arms Act.

32. In the result, the appeal, so far it relates to appellants, namely, Indradeo Choubey, Laxmikant Choubey and Kanhaiya Choubey, succeeds.

33. The appeal, i.e., Cr. Appeal (DB) No. 237 of 2010, filed by Dhananjay Choubey is partly allowed, as he has been acquitted from the charge under Sections 302/149 of the Indian Penal and conviction under Section 307 of the Indian Penal Code.

34. The appeal, i.e., Cr. Appeal (DB) No. 250 of 2010,



filed by appellant Mrityunjay Choubey @ Nachikar Choubey is dismissed.

(Samarendra Pratap Singh, J)

(Arun Kumar, J)

Sujit/-

AFR/NAFR	NAFR
CAV DATE	
Uploading Date	29.06.2017
Transmission Date	

