

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.182 of 2014

Arising Out of PS.Case No. -44 Year- 2003 Thana -SHAKURABAD District- JEHANABAD

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GANAURI YADAV S/O RAM DHAYAN YADAV RESIDENT OF VILLAGE-
UTTRAPATTI, P.S- SHAKURABAD, DISTRICT- JEHANABAD.

.... APPELLANT/S

VERSUS

THE STATE OF BIHAR

.... RESPONDENT/S

with

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Criminal Appeal (DB) No. 361 of 2014

Arising Out of PS.Case No. -44 Year- 2003 Thana -SHAKURABAD District- JEHANABAD

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DEV SHARAN YADAV @ DEV CHARAN YADAV, SON OF MUNILAL
YADAV RESIDENT OF VILLAGE-UTRAPATEE, P.S.-SAKURABAD,
DISTRICT-JEHANABAD.

.... APPELLANT/S

VERSUS

THE STATE OF BIHAR

.... RESPONDENT/S

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Appearance:

(In CR. APP (DB) No.182 of 2014)

For the Appellant/s : Mr. Ramakant Sharma, Sr. Adv.
Mr. Rakesh Kumar Sharma, Adv.
For the Respondent/s : Mr. Ashwani Kumar Sinha, APP
Mr. S.C. Mishra, APP

(In CR. APP (DB) No.361 of 2014)

For the Appellant/s : Mr. Ramakant Sharma, Sr. Adv.
Mr. Rakesh Kumar Sharma, Adv.
For the Respondent/s : Mr. Ashwani Kumar Sinha, APP
Mr. S.C. Mishra, APP

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CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH
and
HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI)

Date: 28-01-2017

Cr. Appeal (DB) No.182 of 2014 wherein Ganauri Yadav is the
appellant and Cr. Appeal (DB) No.361 of 2014 wherein Dev Sharan Yadav @
Dev Charan Yadav is the appellant commonly, originate against the judgment
of conviction dated 29.01.2014 and order of sentence dated 05.02.2014 passed
by Ad-hoc Additional Sessions Judge, 1st, Jehanabad in Sessions Trial No.433



of 2004 / 379 of 2013 on account thereof, have been heard together and are being disposed of by a common judgment. Both the appellants have been found guilty for an offence punishable under Section 364/34 IPC, 302/34 IPC, 201 IPC and have been directed to undergo imprisonment for life as well as fine of Rs.20,000/- under both heads separately that means to say under Section 364/34 of the IPC of 302/34 IPC, independently and R.I. for three years under Section 201 of the IPC as also fine of Rs.10,000/- and in default thereof, to undergo S.I. for six months additionally. Furthermore, the sentences have been directed to run concurrently.

2. PW.7, Motilal Yadav filed written report on 23.05.2013 alleging inter alia that on 22.05.2013 at about 07:00 PM while, his brother Brajesh Kumar had gone to meet nature's call, was apprehended by his co-villager Gajendra Yadav, Satan Yadav, Nand Yadav, Arun Kumar, Ganauri Yadav, Vijay Yadav, Sanjay Kumar, Deocharan Yadav, Rohan Yadav, Bablu Kumar, Yogendra Yadav, Kamlesh Yadav, Ramswarath Yadav, Baldo Yadav, Brijmohan Yadav and took him away towards eastern Badhar. They have made hectic search but could not find him. The motive for occurrence has been assigned as daughter of Nanhak Yadav had eloped with Raj Kumar @ Tuntun, son of Budhan Yadav, his pattidar and for that Nanhak Yadav was threatening to return the girl or they will have to face ultimate result.

3. On the basis of the aforesaid written report, Shakurabad P.S. Case No.44/2003 was registered under Section 363,120(B), 34 of the IPC, which during course of investigation was converted under Section 364, 302,201/34 of the IPC, whereunder charge sheet was also submitted and accordingly, appellants have faced trial which ultimately resulted adverse to



their interest which has been challenged under present appeal.

4. The defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 Cr.P.C. is that of complete denial as well as false implication. However, neither any DW nor any kind of documents has been adduced during course of trial.

5. While assailing the finding recorded by the learned trial court, it has been submitted that after perusal of the judgment impugned, it is apparent that learned trial court had acted in mechanical way by non-appreciating the factual as well as legal aspect. To substantiate the same, it has been submitted that none of the independent witness has been examined in this case whose presence, as per evidence of the witnesses was there. Apart from this, it has been submitted that whoever been examined are own family members and whose inconsistent version clearly speak that none of them happens to be an eye witness to occurrence. That being so, the status of the witnesses happens to be un-creditworthy, unreliable whereupon their evidences ought to have been rejected by the learned trial court.

6. It has further been submitted that there happens to be no evidence with regard to murder of the deceased nor the flesh, bone particles allegedly recovered, though not found by the Investigating Officer during course of investigation were connected to be that of alleged victim Brajesh Kumar and on account thereof, conviction and sentence relating to Section 302/34 IPC as well as Section 201 of the IPC are not at all substantiated. So far Section 364/34 IPC is concerned, from the nature of the evidence as indicated above, being unreliable, worthless, incredible that part is also not found proved. Consequent thereupon, the judgment of conviction and sentence impugned



attracts interference by way of getting it set aside.

7. On the other hand while repelling the submission having been made on behalf of appellant, it has been submitted by the learned Additional Public Prosecutor that court has to search out truthfulness of the matter from the materials having been placed on behalf of prosecution. It is not the sound principle that falsity of particular part of the evidence will nullify the whole evidence rather the parts of the evidence considered unreliable at the end of the court will be discarded at the time of scrutiny as well as appreciation of the evidence and the remaining part which substantiate the case of the prosecution is to be accepted. By adopting such methodology when the evidence of the witnesses have been considered, it is apparent that prosecution succeeded in substantiating its case whereupon judgment of conviction and sentence needs no interference.

8. In order to substantiate its case prosecution had examined altogether nine PWs out of whom PW.1 is Rajdeo Yadav, PW.2 is Baldeo Prasad, PW.3 is Niteshwar Yadav, PW.4 is Krishna Yadav, PW.5 is Baijnath Yadav, PW.6 is Ganga Dayal Yadav, PW.7 is Motilal Yadav, PW.8 is Anselam Minz, PW.9 is Anand Kumar. Prosecution had also exhibited Exhibit-1– Formal FIR, Exhibit-1/1 – Signature of informant over written report, Exhibit-2 - Written report, Exhibit-2/1–Endorsement over written report.

9. Now coming to the ocular evidence, it is apparent that PW.1 had simply deposed that Brajesh Kumar was kidnapped about the two years ago. Still he is traceless. Identified the accused in dock but had not said that these accused persons are responsible for kidnapping Brajesh. In likewise manner, he had not stated that Brajesh had been murdered.



10. PW.2 is Baldeo Prasad, an advocate clerk, who had exhibited formal FIR.

11. PW.3 is Niteshwar Yadav. He had stated that on the alleged date and time of occurrence he was at his house. At that very time he saw Gajendra Yadav, Satan Yadav, Nand Yadav, Arvind Ydav, Arun Kumar, Ganauri Yadav, Sanjay Yadav, Vijay Yadav, Rohan Yadav, Bablu Kumar, Yogendra Yadav, Kamlesh Yadav, Ramswarath Yadav, Baldo Yadav, Brijmohan Yadav, Krishna Mohan Yadav carrying Brajesh Yadav towards Badhar lying east to the village.

12. They have made hectic search but was not traced out. Later on while Chandra Yadav started his boring, flesh piece obstructed the boring whereupon rumour floated in the village. they have gone to P.S. along with flesh particles. Brajesh had not returned till today. He identified the accused. During cross-examination he had admitted in para-2 being cousin of the informant. He had also admitted that village is bifurcated in two groups, one set belongs to the prosecution and the other to the accused. Further, he stated that when Brajesh was being taken away, he was at his house wherefrom had seen the same. Other family members were inside his house. He alone was at his Darwaja. Motilal was present at his house along with other family members. In para-3 he had stated that while he was at his Darwaja, at that very time he heard sound of groaning. He had not raised alarm. He had gone inside his house as well as to the house of his uncle to disclose that Brajesh was taken away. They have not raised alarm out of fear. Chandradeep (not examined) had gone to inform chowkidar. Chandradeep is his uncle. Thereafter, Chowkidar came with whom the family members went to P.S. Then he corrected that it was Motilal and Chandradeep who went to the P.S. the following morning. They searched for



Brajesh whole night. Villagers have not disclosed anything. While Brajesh was going to meet nature's call, at that very moment he was kidnapped. In para-4, he had stated that his Darwaja lies on western front. Accused were taking away Brajesh towards eastern direction. He is unable to say who was forward and who was backward. Then again he said that Gajendra had caught hold right hand of Brajesh while Ganauri had caught hold of left hand of Brajesh. Rest had encircled him. Then had said that it was difficult to identify the flesh and also stated that after 10-12 days of the occurrence, flesh was found. Para-5 is the contradiction. The said evidence is not at all tested from the evidence of PW.8 and PW.9, (Investigating Officer) though it is not clear whether either of them had recorded statement of this witness.

13. PW.4 is Krishna Yadav who had stated that on the alleged date and time of occurrence he was at his house. After hearing uproar, he had gone towards eastern side of the village, where he had seen Arun Yadav, Ganauri Yadav, Deocharan, Satan, Kamlesh, Dharmendra Yadav, Ramswarath, Rohan, Bablu, Fagu, Baldeo, Brijmohan carrying Brajsh Yadav towards Badhar lying east to the village. Further, he had disclosed that aforesaid occurrence was committed as Rinku Kumari D/o of Nanhak Yadav had eloped with Raj Kumar S/o Budhan Yadav. He had further stated that Raj Kumar happens to be cousin of Brajesh. He had further stated that in the aforesaid background Brajesh Yadav was murdered and flesh was concealed in a boring. During cross-examination he had stated that Badhar lies after one or two houses from his house towards western direction. He had further stated that Niteshwar (PW.3) happens to be his full brother who resides with him. He had further stated that he is unaware whether deceased had animosity with the other co-villagers or



not. He had further admitted that for kidnapping of Rinku, case has been registered wherein prosecution party happens to be accused. In para-3, he had stated that Brajesh had no hand in abduction of daughter of Nanhak nor the accused persons suspected him. He had further stated that villagers use to go towards west to his house to meet natures call. He had further stated that Brajesh had raised alarm after an hour of his departure for going to meet natures call. He had raised alarm that he was being caught hold. Then the villagers including he himself rushed towards the P.O. Chandradeep, Nitesh, Motilal and Rajeshwar have gone. They have also raised alarm but none of the villagers came. When they have gone towards that direction, they have not found Brajesh and on account thereof, they returned. Then thereafter they have not gone to village nor spoken to any of the villagers regarding the occurrence. They have gone to P.S. where they arrived at 04:00 AM. Motilal had also gone. He along with Motilal have disclosed before the police regarding the occurrence. Motilal had informed the police in writing. Then thereafter they returned. In village they have come to learn that Brajesh was kidnapped by the accused persons. From whom they have come to learn, he is not remembering his name presently. Then thereafter there happens to be contradiction but again same is not at all legally brought up on record from the evidence of PW.8 as well as PW.9 (Investigating Officer).

14. PW.5 is Baidnath Yadav he had said that on the alleged date and time of occurrence he came to know that Brajesh was kidnapped. As he had not disclosed names of kidnapper on account thereof, he was declared hostile by the prosecution. Even then, prosecution could not be able to extract anything in its favour.



15. PW.6 is Ganga Dayal Yadav who had stated that he is not remembering the occurrence which took place about two and half years ago. After drawing his attention, he had stated that Brajesh and a girl were kidnapped. Pumping set was running for the purpose of irrigation work and during course thereof, small bone particles flushed over. Thereafter, he returned to his village taking his pumping set. He had denied his knowledge with regard to any subsequent event though he was not at all declared hostile.

16. PW.7 is Motilal Yadav. He happens to be informant. He had stated that on the alleged date and time of occurrence he was at his Darwaja. At that very time his brother Brajesh was going to meet nature's call and during said course, he was kidnapped by his co-villager Gajendra Prasad, Satan Yadav, Arun Kumar, Ganauri Yadav, Nand Yadav, Ramswarath Yadav, Kamlesh Yadav, Vijay Yadav, Sanjay Yadav, Deosaran Yadav, Rohan Yadav, Bablu Yadav, Yogendra Yadav, Baldeo Yadav, Brijmohan Yadav. They dragged his brother towards northern-eastern direction over which his brother raised alarm. They rushed towards him and found the accused persons taking away his brother. He proceeded towards them on which accused persons threatened to kill. As all of them were armed with country-made gun. He, out of fear, returned back. His brother has not been found since then. Accused persons had vanished his brother. About 10-15 days after the occurrence, while Ganga Yadav and Baijnath Yadav were irrigating from the boring of Chandra Yadav. Lungi particle, flesh, bones, flushed out. There was rumour in the village whereupon he had gone to that place, saw the lungi particle and identified that of his brother whereupon he opined that accused persons caused murder of his brother after kidnapping.



17. The motive for the occurrence has been assigned on account of elopement of daughter of Nanhak Yadav, namely, Rinku Kumari with Raj Kumar @ Tuntun, his Gotiya and for that Nanhak and his family members were threatening since before. He had filed written report before the police (Ext.-1).

18. During cross-examination had admitted in para-2 that accused persons had already instituted a case on that very score. In para-3 he had admitted that he was also one of the accused in that very case. He had further stated that accused have got no grievance with Brajesh. He further stated that at about 07:00 PM his brother was going to meet natures call. At that very time he was at his Darwaja. Niteshwar, Krishna were along with him. They were sitting for the last one hour. He had further stated that just 1-2 minute after departure of his brother there was an alarm that accused persons were carrying his brother. His brother had raised alarm. All of them proceeded conjointly. They have not raised alarm. When they saw accused persons, at that very time they were dragging his brother towards northern-eastern direction. He had seen from the distance of twenty yards. They have raised alarm but one of the villagers came. They stood there out of fear. They remained there till disappearance of his brother along with accused and then thereafter they returned to his house where they stayed whole night. On following morning they have gone to police station and reached at about 08:00 AM. In para-4 he had stated that he carried written information from his house. Then his attention has been drawn up from the initial version that of FIR.

19. PW.8 is part Investigating Officer who took investigation from his predecessor, Shashi Bhushan Singh. He recorded statement of only two witnesses Ganga Yadav and Baidnath Yadav and then submitted charge sheet.



During cross-examination he had stated that the first Investigating Officer happens to be Anand Kumar and then Shashi Bhushan Singh. He had not inspected place of occurrence. He had not visited the second place of occurrence as alleged by the prosecution.

20. PW.9 is first Investigating Officer, Anand Kumar who had stated that on 23.05.2003 while he was Officer-in-charge of Shakurabad P.S. Motilal Yadav had handed over written information on the basis of which Shakurabad P.S. Case No.44/2003 was registered. He himself took up investigation. He recorded further statement of informant. He inspected place of occurrence which happens to be Badhar lying east to the house of informant. He had shown boundary. East-Badhar, West-House of Informant, North-barren land, South-Badhar. He took statement of Krishna, Niteshwar, Rajdeo, Jitendra and then he handed over charge on account of his transfer. During course of cross-examination in para-3 he had stated that Motilal had handed over written information on 23.05.2003 at about 02:00 PM.

21. While scrutinizing the evidence of the PWs, it is evident that PW.3 and PW.4 are full brother and as per evidence of PW.4 they were conjointly living. As per PW.3, it is evident that in examination-in-chief he had not named Dev Sharan Yadav @ Dev Charan Yadav. He had further stated that at that very time he was at his house but he had not shown presence of PW.4 along with him though PW.4 had also claimed that he was at the house. Apart from this he had stated during cross-examination that he had seen the accused persons carrying Brajesh Yadav. At that very time he was alone at his Darwaja. In para-3 he had stated that while he was at his Darwaja he heard groaning sound and out of fear, had not raised alarm. He had gone inside his house as



well as to house of his uncle to disclose that accused persons were taking away Brajesh. He had not stated that anybody had gone towards the alleged P.O. On the other hand PW.4 had stated that he heard alarm where upon he rushed towards the P.O. and saw the occurrence. In para-3 of the cross-examination, he had stated that about an hour of Brajesh going towards Badhar to meet natures call, he raised alarm stating that he was being dragged. He had stated that he along with Chandradeep (not examined) Niteshwar Yadav, Motilal Yadav, Rajesh Yadav also rushed towards the place of occurrence. But PW.3 (Niteshwar Yadav) had contradicted the evidence of PW.4. (Krishana Yadav) as he had not narrated substantiated the same, rather had deposed that he disclosed about occurrence inside his house as well as at the house of his uncle. He had not claimed following the victim as well as accused. He had further stated that though they had gone towards that direction they did not find Brajesh. PW.7 the informant in his examination-in-chief stated that when the accused persons began to drag his brother Brajesh who had gone towards Badhar for easing himself, he raised alarm over which they rushed and saw the accused persons who were carrying his brother. When he proceeded ahead, he was threatened to be shot dead as they were carrying countrymade pistol. This part of evidence is found completely inconsistent with the evidence of PW.3 as well as PW.4. In the aforesaid background, now the question arose which of these three should be accepted as reliable, trustworthy, creditworthy witness. Certainly PW.3 and PW.4 in the background of their inconsistency, would not be considered as an eyewitness to occurrence. Then PW.7 only remains and whose evidence in the background of such development from his initial version which the defence had controverted under para-4 of his cross-examination,



makes his status doubtful, suspicious as an eye witness to occurrence. Furthermore, though informant had claimed that lungi particle, flesh, small bones particles flushed out from the boring of Chandra Yadav, is not found substantiated by Baijnath Yadav (PW.5). So far Ganga Yadav (PW.6) is concerned, he simply stated with regard to flushing of small bone particles and not of lungi particles. Moreover, neither PW.8 nor PW.9 substantiated the same.

22. Consequent thereupon, it looks unsafe to rely upon testimony of such kind of witnesses. As such, the judgment of conviction and sentence recorded by the learned trial court is set aside. Appeal is allowed. Both the appellants are under custody, hence are directed to be released forthwith, if not wanted in any other case.

(Aditya Kumar Trivedi, J.)

(Samarendra Pratap Singh, J.)

Prakash Narayan

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