

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.326 of 1994

Arising Out of judgment dated 6th May 1994 passed by learned Additional Sessions Judge – 6th, Begusarai in Session Trial No. 122/1992

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1. Shankar Mahto, son of Kulo Mahto
2. Ratan Sada, son of Shibdhan Sada
Both residents of village Rudauli, P.S. – Bachhwara, District – Begusarai.

.... Appellants

Versus

The State of Bihar

.... Respondent

With

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Criminal Appeal (DB) No. 1086 of 2008

Arising Out of judgment and order dated 18.08.2008 and 21.08.2008 passed by learned Additional Sessions Judge, F.T.C.-I, Begusarai in Session Trial No. 122(B)/1992

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Kari Sah, son of Late Shiwan Sah, resident of village – Bharaul, P.S. – Bachhwara, District – Begusarai.

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant/s : Mr. Arun Kumar, Advocate
Mr. Anukriti Jaipuriyar, Advocate
Mr. Rai Mukesh Sharma, Advocate
Ms. Aaruni Singh, Advocate
For the State : Mr. Abhimanyu Sharma, A.P.P.

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CORAM: HONOURABLE THE CHIEF JUSTICE

And

HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date: 01-05-2018

These two criminal appeals have been preferred
for setting aside the judgment dated 6th May 1994 passed by



learned Additional Sessions Judge – 6th, Begusarai in Session Trial No. 122/1992 and judgment and order dated 18.08.2008 and 21.08.2008 passed by learned Additional Sessions Judge, F.T.C.-I, Begusarai in Session Trial No. 122(B)/1992. The accused Shankar Mahto and Ratan Sada were facing trial for the offences under Section 396 and 412 of the Indian Penal Code. By the impugned judgment the learned trial court has convicted both the accused for the offences above said and convicted the accused Shankar Mahto and Ratan Sada both for the offences punishable under section 396 and 412 of the Indian Penal Code. They have been sentenced to undergo rigorous imprisonment for life under Section 396 of the Indian Penal Code and rigorous imprisonment for 7 years each for the offences under Section 412 of the Indian Penal Code. Both the sentences shall run concurrently. Accused Kari Sao (appellant) has been convicted in Sessions Trial No. 122(B)/1992 and has been sentenced to undergo imprisonment for life under Section 396 of I.P.C. and also imprisonment for life under Section 412 of the I.P.C. All the sentences are to run concurrently.

2. As it appears the prosecution case is based on the fardbeyan of one Sitaram Sah (P.W.4) who alleged that in



the night between 30.12.1991 and 31.12.1991 while he was sleeping with his wife Asha Devi and youngest child in the room situated towards western side of his house, his mother Arhul Devi and daughter Sudha Kumari (11 years) both of them were sleeping in the front shop of the Darwaza. It is alleged that at about 11.00 O'Clock in the night he heard the sound of Dham Dham in the room which was in front of the door and his wife heard the voice abusing his mother, his wife told him that someone was assaulting his mother. The informant claimed that he came out of the bed and went outside the room and from there he went to the roof of the house through ladder and thereby he went out of the house and concealed himself under the bundle of the paddy and he raised hulla. On hulla, the people from the neighbouring houses started coming, the accused persons started abusing them and threatened them because of which the neighbouring people started retreating. It is alleged that the miscreants were moving the torch light and in a short time there was a sound of firing. Informant further alleged that the miscreants stayed in his house for about ½ an hour and while they were going away the informant found them in 11-12 numbers. After the miscreants went away, the



informant came back in his house and found that his wife was lying on the katchi road situated in the western side to the house of Padarath Jha.

3. The informant thereafter found that his wife had died, he brought the dead body with the help of local persons to his house, there he found that the door of the house was in a broken condition, when he went inside the house he found that the entire house-hold articles were lying here and there. The informant alleged that some cloths such as Sari, Shirt and one HMT Kohinoor Watch besides some cash from the cash box of the shop had been looted away. He also stated that all the miscreants had torch in their hand, they were speaking local language and had tied their face with *gamcha*. The informant claimed that he can identify the miscreants. He also claimed that at the time of occurrence one lantern was burning in the shop room in front of *Darwaza*. According to the informant his wife was killed by use of *Chura* while she was protesting against the miscreants. The fardbeyan of the informant (P.W.4) has been marked as Exhibit-1 and the formal F.I.R. giving rise to Begusarai P.S. Case No. 30/1991 has been marked as Exhibit-2.



4. In course of trial the accused persons pleaded not guilty and claimed to be tried. Prosecution examined as many as 12 witnesses. P.W.1 Sudha Kumari, the daughter of the informant and the deceased lady who was murdered by the dacoits, claimed herself an eye witness to the occurrence. It is this P.W.1 who was sleeping with the mother of the informant and on the very next day of the occurrence she was sent to the village of her maternal uncle. She came back from there after 12 days and thereafter her statement was recorded by the Investigating Officer (in short the "I.O."). In her deposition, she has stated that a 'Diya' was burning in the room and in the said light of Diya she had identified Ratan, Kariya, Naraman and Shankar. She has stated that Ratan had given the knife blow on the neck of her mother, her mother had caught hold of Shankar and for that reason Ratan had given her a knife blow. She has stated that her mother fell down at some distance, dacoits stayed in her house for about one hour. She had identified one of the dacoits in jail. This witness has stated that after the occurrence she was sent to her Nanihaal. In course of her cross examination she has stated that after 10-12 days her statement was recorded by police. She has also stated that Shankar and



Ratan are neighbours and their houses are situated only after two houses besides the house of this witness. This witness has stated that 2-3 persons had entered in the room, according to this witness her grandmother had opened the door on hearing the sound of *Khat-Khat*.

5. The defence cross examined her on the means of identification also and drew her attention towards the statements made by her in course of examination in chief. In her examination in chief she had stated that a Diya was burning in the room, but in cross examination she stated that a lantern was burning and when confronted by defence she tried to explain her statement made on the previous day of her deposition stating that Diya was burning in the room in which her mother was sleeping and a lantern was burning in the room in which she was sleeping. She has admitted that in course of her statement before police and the Magistrate she had not stated that Diya was burning in the room of her mother. She claimed that Daroga was shown lantern but that was not seized. She has further stated that Diya was not shown to Daroga. In paragraph 9 of her cross examination, she has stated that she had not disclosed the name of the dacoits who were



identified by her to her father because the dacoits had threatened her that on disclosing their identity the entire family will be killed. She has further stated that her father did not ask her whether she had identified any of the miscreants. Her grandmother had also not asked her whether she had identified any of the criminals.

6. P.W.1 even though claimed to be an eye witness as stated in her cross examination that she did not disclose the identity of the miscreants/criminal to anybody. She did not remember whether she had disclosed about the identity to the Daroga. In paragraph 11 of her cross examination P.W.1 has stated that she had seen the accused Kari 2-3 days after the dacoity in the village and at the police station. In the very next line, she says that after dacoity she had gone to Begusarai after about two months. She had gone there with her father and Daroga and Chowkidar had taken her inside the jail and she had made a statement to the Daroga in presence of Magistrate that Shankar had caught hold of her mother and Ratan had given her knife blow. She denied the suggestion that she was giving a wrong statement regarding identification of the dacoits at the instance of one Ramjivan



Babu of the village who is a reach person. P.W.2 is Dhodhai Sada who has deposed that Ratan had told him to come with him for committing dacoity in the house of Sitaram, but this witness refused to accompany him. He has stated that 5-6 persons were there when he was asked to follow them for the purpose of dacoity, he had fled away. In the morning he heard that the dacoity had been committed in the house of Sitaram. In his cross examination, he had admitted that he had been provided land by one of the Gotias of Ramjivan Babu. House of this witness was situated beside the house of the informant and Ratan's house is situated beside the house of this witness. In his cross examination he has stated that he was arrested by Daroga Jee in this case after 8-9 days, he had not told anybody about the fact that he was asked by Ratan to participate in the dacoity. He had not informed this to Chowkidar also.

7. P.W.3 is one Binod Kumar Sao aged about 13 years who is the son of the informant and he had also claimed himself to be an eye witness in this case. According to this witness, Naraman Sah had ordered to give a knife blow on which Ratan Sada had assaulted his mother by Chura. This witness claimed that he had been caught by one of the



accused. In his cross examination, he has stated that his statement was recorded in police one day after the statement of his sister Sudha Kumari. He has stated that the miscreants who had caught hold of him had tied his face with Gamcha. He has further stated that the miscreants had attempted on him by Chura but he had fled away. In paragraph 4 of his cross examination, this witness has also stated that he had not disclosed the name of dacoits to his father and others. He has also stated that before the Magistrate he had not stated that due to a threat he had not disclosed the name of the dacoits to his father and family members. He has also stated that before the Magistrate he had stated that someone had caught hold of his hand but in police statement he had stated that Kari Sao and Shankar Mahto had caught hold of him he has stated that he had identified the criminals in the light of lantern.

8. He had also stated that Daroga had not seized the lantern. P.W.4 is Sitaram Sah (informant) who has reiterated his version in his deposition. He has stated that he had awoken when his wife told him that somebody is beating his mother, he came in the courtyard in the house where there was a ladder made of wood. He went on the roof with the help



of ladder and from there he went at the roof of Binu Sah and raised hulla. Thereafter he has stated that when the people started assembling, the miscreants abused them and when the miscreants went away the informant came down and found that his wife was killed. He went to police station in the morning and informed to Daroga who came to his house. He has proved his fardbeyan recorded by Daroga which has been marked as Exhibit-1. He has further stated that from the looted articles Daroga had seized Soap, Biscuit from the house of Ratan Sada. From the house of Kari Sao, Thali, Lota and Glass were seized. From the house of Shankar also Thali, Lota and Glass and Biscuit were seized. The looted articles were identified by the informant. He had stated that he had sent his son and daughter to their Nanihaal. This witness did not remember as to after how many days his son and daughter returned. He has stated that the statement of their son and daughter were recorded after their return from Nanihaal. In his cross examination, he had denied the suggestion that Ratan Sada and Shankar Mahto had taken the land of the informant on Batai. He has stated in his cross examination that after the dacoits went away he had no talk with anybody, he had not



enquired about them from anybody and nobody told anything. He denied the suggestion that he had given the list of looted articles to Daroga after 3-4 days. He claimed that he had purchased the looted articles from market but he could not trace the cash-memo of those articles. He did not remember as to when the articles were seized from the house of Ratan and other accused. On the point of identification of the seized articles he had stated that the utensils which were looted by dacoits were used in his house on day to day basis. He had not given the weight of the utensils to Daroga Jee. He has stated that the 'Agni' was given to his wife by his son Binod but after giving Agni and during the Shradh period he was in his Nanihaal.

9. P.W.5 Ram Swaroop Sah is the uncle of the informant. He is a seizure list witness and has proved his signature on the seizure list marked Exhibit-1/2. In paragraph 2 he has stated that Daroga had not conducted search in the house of Ratan Sada in his presence. He has also proved his signature on the seizure list marked Exhibit-1/3. He has stated that when he signed the seizure list the biscuit and soap were in front of him .he has stated that soap and biscuit are being



sold in his village. He has proved his signature on the inquest report of the dead body which has been marked Exhibit-1/4.

10. P.W.6 Nathuni Sada is another seizure list witness who has proved his signature Exhibit-1/5 and 1/6. He has also stated that the search in the house of Shankar and Ratan were not conducted in his presence. This witness has further stated that on both the papers his signature was obtained at the house of Ramjivan Singh. He has been declared hostile as he denied that at the time of his taking his signature the biscuit and soap etc. were not there.

11. P.W.7 is Bhola Ishawar who has also denied seizure of looted articles in his presence. This witness has also been declared hostile.

12. P.W.8 Ram Subhit Mochi was the Officer Incharge of Bachchwara Police Station on 31.12.1991. He had recorded the farbeyan of P.W.4 and started investigation. He has proved the formal F.I.R. He had also prepared the inquest report and had described the place of occurrence. He had found the door in the broken condition. This witness has stated that he had sent the dead body for post mortem and the informant had given the list of looted articles to him. In course



of cross examination this witness has stated that he had not entered as to who had informed him about the occurrence. He has also stated that the informant had not given the list of looted articles in his fardbeyan. In paragraph 14 of his cross examination he has stated that he had not entered any information in the case diary that there was 'lantern' or 'Dibia' at the place of occurrence. He had not found any blood in the street where the deceased had gone. Blood was found on the outside Varandah but the same was not seized by him. In Paragraph 15 of his cross examination he has stated that he had recorded in paragraph 34 of his case diary that he had searched for the witnesses but they were not available. He had not recorded the description of the house of Ratan Sada which was searched by him. He has stated that the statement of witnesses Sudha Kumari and Binod were recorded on 11.01.1992. In paragraph 16 of his cross examination he has stated that he had not found any lantern in the room where the deceased was said to be sleeping. In paragraph 17 he has stated that Sudha Kumari had not given him lantern and had not told him in course of her statement that Shankar had caught hold of her mother and Ratan had given a Chura blow.



In paragraph 18 this witness has stated that Dhodhai(P.W.2) had not disclosed before him that Ratan had asked him at about 10.20 p.m. to participate in the dacoity. In paragraph 19 he has stated that Binod (P.W.3) who is the son of the informant had not told him that Kari Sao and Shankar Mahto had caught hold of his mother. He had also not told him that on the order given by Narayan Sao, Ratan Sada had given a Chura blow to his mother.

13. P.W.9 Ramnath Ishwar has been declared hostile. He was one of the seizure list witnesses but has denied that there was any search. P.W.10 is Dr. Ashok Kumar Ray who was posted as Civil Assistant Surgeon at Begusarai on 31.12.1992. He had performed the post mortem on the dead body of Asha Devi and has proved that the post mortem report (Exhibit-5) was in his pen. He has found one incised wound $\frac{1}{2}$ x $\frac{1}{4}$ " into left chest cavity deep on left side of base of neck in front to lateral portion.

14. P.W.11 is Girish Nandan Singh who was the Judicial Magistrate at Begusarai. On the instruction of Chief Judicial Magistrate, Begusarai he had got done the identification parade of the under-trial prisoner Kari Sao. P.W.1



Sitaram Sah and P.W.2 had identified. In his cross examination he has stated that he had not told the witnesses that they were identifying the suspects whose name and address they do not know. He had also not recorded in his T.I. Chart that both the witnesses were called one after another. P.W.12 Ramnath Singh who was the Anchal Adhikari at Bachhwara, on 13.02.1992 had got done the identification parade of the seized articles which were identified by the informant.

15. The statement under Section 164 Cr.P.C. of Sudha Kumari (P.W.1), DhodhaiSada (P.W.2) and Binod Kumar Sah (P.W.3) have also been proved in course of evidence. The learned trial court recorded a finding of guilt against the aforesaid two accused persons who were facing trial after the case of another accused Kari Sao was separated. The Trial Court rejected the plea of the defence that the allegation of overt act was against Kari Sao. In their statement under Section 313 Cr.P.C. the accused-appellants denied the allegations. Karo Sao was tried vide sessions Trial no. 122(B)/1992 in which he has been held guilty vide judgment dated 18.08.2008 and sentenced to undergo life imprisonment vide order dated 21.08.2008.



16. Learned counsel representing the appellants has vehemently argued that the learned trial court has completely missed-out in appreciation of the prosecution evidences which are available on the record. The learned trial court could not appreciate the material contradictions and inconsistencies in the statement of the child witnesses namely, Sudha Kumari (P.W.1) and Binod Kumar Sah (P.W.3). It is submitted that 10-12 days after the alleged occurrence these two witnesses were planted as eye witnesses but in their statement in course of trial they have miserably failed to maintain consistency in their statements.

17. On the other hand, learned counsel representing the State submits that there is no contradiction in the statement of the child witnesses and the appreciation of the learned trial court cannot be found fault with.

18. Having heard learned counsel representing the appellants in both the appeals and learned A.P.P. representing the State, we find that the prosecution has not been able to prove the guilt of the accused-appellants in the present case beyond all reasonable doubts. The informant (P.W.4) did not disclose the name of these appellants who



happened to be his neighbours at the time of recording of his fardbeyan. His daughter Sudha Kumari (P.W.1) and son Binod Kumar Sah (P.W.3) did not make any statement before the Police Officer investigating the case regarding identification of the appellants. These two witnesses were sent to their Nanihaal and only after 10-12 days they came back to the village and got recorded their statement before police. The I.O. (P.W.8) has clearly stated that in their statement before police neither P.W.1 nor P.W.3 disclosed the name of the identified miscreants/criminals. P.W.8 has also stated that Dhodhai Sada (P.W.2) in course of his statement before police did not disclose that in the night hour at about 10.30 p.m. on the alleged date of occurrence he was asked by Ratan to accompany him. The I.O. did not find any blood in the street and has clearly stated that he was not shown the lantern by P.W.1. The inconsistency in the statement of P.W.1 & P.W.3 are so glaring that on a reading thereof the entire deposition of these witnesses would lose its credence. The seizure lit witnesses have been declared hostile and the nature of articles which are said to have been seized are soap and utensils without there being any specific mark to attach them with the looted articles from the shop of



the informant. We further find that the statement of the appellants under Section 313 Cr.P.C. have been recorded in a most casual manner. The attention of the appellants was not drawn towards the incriminating materials brought by the prosecution against them in course of evidence. Only a formality has been done in the name of statement recorded under Section 313 Cr.P.C. by asking two questions which have been answered by them in the following manner :-

प्रश्न-ऐसा कहा जाता है कि दिनांक 30.12.91 तथा 31.12.91 को रात में आप लोग सीता राम साह के घर में डकैती किये और डकैती करने के दौरान आप सीता राम साह की पत्नी आशा देवी की हत्या किये ?

उत्तर- जी नहीं।

प्रश्न- ऐसा कहा जाता है कि डकैती में लूटा हुआ थाली, लोटा, गिलास, बिस्कुट आपके यहाँ से बरामद हुआ था ?

उत्तर- जी नहीं।

प्रश्न- आपको इस सम्बन्ध में और क्या कहना है ?

उत्तर- और कुछ नहीं कहना है।

19. According to P.W.1 her grandmother had opened the door but the informant says that when he returned after miscreants went away, he found that the dead body of his wife was lying on the road situated in the western side to the house of Ram Padarath Sah. The I.O. has not found any blood



lying there and moreover it is difficult to understand that if P.W.1 states that her grandmother had opened the door then how the door was found in a broken condition because in such situation the dacoits had no occasion to break open the door. P.W.1 & P.W.3 have talked about the means of identification as ‘lantern’ and ‘Dibiya’ with a lot of inconsistencies which they tried to explain by their statements but that do not find credence.

20. In the given circumstance the conviction of the appellants cannot be allowed to sustain. The impugned judgment is hereby set aside and the appeal is allowed. The appellants are discharged from the liability of their bail bonds.

(Rajendra Menon, CJ.)

(Rajeev Ranjan Prasad, J.)

Rajeev/-

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