

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.29 of 1995

1. Ram Ratan Rai, son of Sarda Rai	
2. Pujari Rai son of Ram Awtar Rai	
3. Birendra Rai, son of Ram Jatan Rai	
4. Acchay Lal Rai, son of Sirja Rai	
5. Sirja Rai, son of Ram Lagan Rai	
6. Jai Sharan Rai, son of Ram Awtar Rai	
7. Ram Jatan Rai, son of Sarda Rai	
8. Hirdaya Narain Rai, son of Ram Awtar Rai	
9. Jagdhar Rai, son of Paras Rai	
10. Girja Rai, son of Ram Laan Rai	
11. Ram Chandra Rai, son of Sirja Rai, all residents of village-Purani Panapur, P.S.-Akilpur, District-Patna.	 Appellant/s
Versus	
The State of Bihar	 Respondent/s

Appearance :

For the Appellant/s	:	Mr. Shravan Kumar, Sr, Advocate Mr. Nand Gopal Mishra, Advocate Mr. Ranbir Singh, Amicus Curiae
For the State	:	Mr. Shiwesh Ch.Mishra, APP

CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

Date : 03-02-2018

This appeal has been preferred by the appellants against the judgment of conviction dated 07.03.1995 passed by the Additional Sessions Judge-II, Patna in Sessions Trial No. 272 of 1990 whereby the learned Additional Sessions Judge-II has convicted the appellant nos. 7, 8 and 9 under section 302 of the Indian Penal Code whereas other appellants have been convicted under sections 324/149 of the Indian Penal Code. The appellant 7, 8 and 9 have been sentenced to undergo R.I. for life whereas other appellants have been sentenced to undergo R.I. for two and half years of R.I.



2. During the pendency of the appeal, appellants, namely, (1) Ram Ratan Rai, (2) Sirja Rai (7) Ram Jatan Rai and (10) Girja Rai have died and as such the appeal on their behalf have been abated.

3. The appeal is now confined to appellant nos. 2, 3 4 6, 8, 9 and 11 only.

4. The prosecution case in brief is that the informant Guru Charan Rai stated in his fard-beyan on 05.12.88 he had carried meal for his father (deceased) Param Rai and after taking the meal his father slept. The informant awoke at 12 o'clock in the night on hearing the sound of some murmuring and the sound of removing the diesel machine. He uttered "ke baa ke baa" upon which Rai Sharan Rai (Appellant-6) uttered "Machine ko Chhoro, Akninhan ke marr, tab Hamra ke sab admi pakarna Chaha, Tab Him Apne Pita Ko Awaj Diya ki Bhago-Bhago. His father awoke and started run away from Palani. Then all the accused persons caught hold of him and the informant by leaving his Chadar run away towards south and flashed his torch light and saw all the accused persons. He saw Jai Sharan Rai (appellant no.6) armed with licensed gun. He further saw Birender Rai (Appellant No.3), Ramchandra Rai (Appellant No.11), Pujari Rai (Appellant No.2) and Acchey Lal



Rai (Appellant No.4) removing the machine. Jagdhar Rai (Appellant No.9) was tying the hands of his father. Hirdanarain Rai (Appellant No.8) was also tying the hands of his father, Ramjatan Rai (Appellant no.7) was tying legs of his father. Girija Rai (Appelalnt no.10), Sirja Rai (Appelalnt no.5) and Ram Ratan Rai (Appelant no.1) were sitting outside the Palani. The informant raised Hulla and the witnesses namely, Raj Ballam Rai (P.W.1), Ashok Rai (P.W.2) came flashing light theywere watching the maize filed near by. The witnesss saw the deceased being assaulted. When all the accused persons assaulted his father 10 to 15 minutes, and went away towards west, the informant entered the Palani and saw his father dead. He sas that the both the legs were tied by sack and neck was tied with Dhoti and hands were tied with Gamchha. He also saw nozzle element and upper body of the machine missing. The cost of the articles was nearly Rs. 2,000/-. He stted that the age of the deceased was about 70 years. The informant asserted that the alleged occurrence took place while removing the diesel machine.

5. The police registered Danapur (Akhilpur P.S. 496 of 1998) under section 396 under section 302 of the Indian Penal Code. The police after investigation submitted charge-sheet



under section 302/34 of the Indian Penal Code however, the trial court framed charge against the appellants under section 396 of the Indian Penal Code. On framing of the charge the appellants pleaded not guilty and as such trial commenced.

6. On behalf of the prosecution, altogether six witnesses have been examined P.Ws.1, 2 and 3 have been examined in this case as eye witness, P.W.4 is the doctor who conducted the post mortem, P.W.5 is the Officer-in-charge of the police station and I.O. of the case and P.W.6 is a formal witness who has certified the signature of the I.O. of the case.

7. The trial court on the basis of scrutiny of the evidence adduced by the prosecution during trial convicted the appellant nos. -7 (now dead) 8 and 9 for offence under section 302 of the Indian Penal Code and sentenced to undergo R.I. for life whereas the trial court convicted appellants nos. 1 (dead) 2, 3, 4, 5-(dead) 6 10-(dead) and 11 under section 324/149 and these appellants were sentenced to undergo two and half years imprisonment.

8. Mr. Sarwan Kumar, learned senior counsel appearing on behalf of the appellant has submitted that prosecution case on the face of it is doubtful and most improbable. He submitted that the alleged occurrence took place according to the informant at



12 of night on 4.12.1998 but Fard-beyan was lodged on 5.12.1988 at 7 p.m. whereas the distance of place of occurrences and the police station is only 5 kilo marters. He submitted that the delay of 19 hours in lodging Fardbeyan itself creates serious doubt about the prosecution case. He submitted that there is no explanation for the inordinate delay of 19 hours in lodging Fard-beyan. The deceased died at a distance of one and half kilometers of the residence and no one has seen the actual occurrence and that is the reason there is belated Fard-beyan in this case.

9. He submitted that the informant has not approached the police station for lodging Fardbeyan rather when the police arrived at the village then the Fardbeyan was recorded at seven p.m. at the alleged place of occurrence. This conduct of the informant is indicative of the fact that the informant and others have not seen the actual occurrence and at the time lodging of Fardbeyan they have introduced story of dacoity by the appellant which has no basis

10.Mr. Sarwan Kumar, Sr. Advocate submitted that lack of explanation on behalf of prosecution for the inordinate delay of 19 hours in lodging the Fard-beyan is not crucial aspect but the same was not considered by the trial court while



convicting the appellants. He submitted that the case was registered under section 396 of the Indian Penal Code. The police after investigation has disbelieved the story of dacoity and as such submitted charge-sheet under section 302/34 of the Indian Penal Code, however the trial court conducted trial for the offence under section 396 IPC but finally convicted under section 302/34 and as such Mr. Sarwan Kumar submitted that police as well as trial court disbelieved the prosecution story about the dacoity while submitting charge-sheet as well as while convicting the appellants.

11. Mr. Sarwan Kumar next submitted that the story of assault as framed by the prosecution was not proved in this case in fact the medical evidence runs contrary to the prosecution case. From the body of the deceased no injury was found by the doctor to suggest that the deceased was assaulted in the manner indicated by prosecution witnesses. Neither in the inquest report nor post-mortem report there is any sign of assault which can be taken as reason for the death of the deceased who was 70 years old.

12. Mr. Sarvan Kumar next submitted that neither in the FIR nor in the trial there was any motive attributed for such crime.



13. Mr. Sarwan Kumar also submitted that the prosecution has introduced altogether different story in the court which was not in the Fardbeyan. The informant has introduced the story during trial that he was sleeping with the deceased. He pointed out with reference to the deposition of the informant that he has seen the appellant no.6 equipped with licencing gun and as such if there was any intention to kill the deceased by the appellants the appellant no. 6 equipped with licensee gun could have used firearm but that was not used and the other manner of commission of crime by the appellant by tying neck of the deceased is also not supported by any evidence much less medical evidence.

14. Referring to the deposition of the witnesses Mr. Sarwan Kumar submitted that in the present case the trial court has in fact disbelieved the story of assault of the deceased as per the version of the prosecution witnesses. Referring to the contradiction in the prosecution version in the FIR and in the court, Mr. Sarwan Kumar submitted that the story introduced in the Fardbeyan was improved in court and a new circumstance of assault and seeing the occurrence was introduced in court. In the Fardbeyan there was no statement that the informant has ever gone to the police station to inform the police about the



occurrence but in the trial he introduced such story that when he reached the police station no one was there to record his statement. This part of the story of the prosecution has been contradicted by P.W.5 and the informant of the case who stated that in the police station ASI was in-charge who could have recorded information in station diary and could have drawn formal FIR if informant had visited the police station.

15. Mr. Sarwan Kumar submitted that the foundation of the prosecution case is that the accused persons assembled the place of occurrence in order to remove diesel pumping set and in that connection the deceased was done to death as on hearing murmuring sound he enquired who is there but the police has disbelieved that part of story during investigation as the police did not find foot print either in side of the hut or outside of the hut which runs contrary to the prosecution case.

16. Referring to other major contradiction Mr. Sarwan Kumar submitted that the I.O. of the case has stated in the court that P.W.2 did not state before him that P.W. 9 has informed him that appellant nos. 4 6 and 11 has tied the neck of the deceased and deceased was pulled away. Thus there is contradiction in the statement before the police and before the the court. The I.O. of the case has deposed in the court that he has not



recovered 'Gendra' and 'Pillow' at the place of occurrence as according to the prosecution the deceased was sleeping in the hut and Gendra and Pillow was there. He has also contradicted the statement of P.W.3 that he has shown the I.O. the utensils used for carrying meal of the deceased.

17. Referring to the contradiction in the version of the prosecution witnesses about the manner of participation of the appellant in the crime and the claim of the prosecution witnesses about seeing the occurrence, Mr. Sarwan Kumar submitted that from the version of different witnesses it would be evident that none of the prosecution witnesses have in fact seen the occurrence. There is major contradiction in their version before the police about manner of occurrence and identification of the accused in the commission of crime and as such it is unreliable and untrustworthy, and renders the prosecution case under serious doubts.

18. Mr. Sarwan Kumar referring to the definite case of the prosecution about tying the neck of the deceased by 'Dhoti' and pulling the deceased away by the accused persons and the nature of injury found on the deceased by P.W.4 the doctor who conducted the post mortem submitted that they are contradicting the kind of injury found on the person of the



deceased which could have been caused by a hard blunt substance and could not have been caused by 'Dhoti' and doctor has also ruled out the possibility of cause of death due to strangulation as there was no ligature mark around the neck. Since bone behind the back of the neck was found fractured such injury could have been caused only by hard and blunt substance which runs contrary to the prosecution case.

19. In the backdrop of the aforesaid infirmity in the prosecution case and major contradiction in the version prosecution witnesses before the police and before the court, Mr. Sarwan Kumar submitted that in view of the major contradiction in the version of the prosecution witnesses particularly the so-called eye-witnesses and the doctor's opinion and the deposition of the I.O. before the court, the conviction of the appellants is most unsafe.

20. Mr. Sarwan Kumar also highlighted in the instant case that there was no evidence to establish that there was source of identification by the informant and in the aforesaid circumstances Mr. Sarwan Kumar submitted that the appellants deserve benefit of doubt as their conviction in the instant case is not beyond all reasonable doubt rather there are serious doubt about the prosecution case.



21. Mr. Sarwan Kumar referring to the discussion of the trial court in para-11 and 13 submitted that trial court has committed grave error in convicting the appellants.

Paragraphs 11 and 13 of the trial court judgment reads as follows:-

“Altogether eleven number of persons were put on trial on the charge of committing dacoity by removing diesel machine and in commission of such dacoity, committing murder of Parmanand Rai. If early version of Gurcharan Rai which he rendered before the police at 19.00 hrs. on 5.12.88 is to be given credence, complicity of three persons only viz. Jagdhar Rai, Hirday Rai and Ram Jatan Rai in committing murder of Parmanand Rai was suggested as the recitals made therein would show that Gajadhar Rai qss tying hands, Ram Jatan Rai was tying legs while Hirday Rai sat over his back and had been twisting the hand on the back side. In the early version of Gurcharan Rai, Birendra Rai Ramchandra Rai, Pujeri Rai and Achhay Lal Rai were shown opening searing while Girja Rai, Sirja Rai and Ram Ratan Rai were showing to be outside the Palani guarding against entrance of outsider. As has been discussed, Gurcharan Rai (P.W.3) reiterated his early version at trial with salutary deviation that all the accused had been pulling Gamchha which was wrapped in the neck of his father. Yet an another story was tole in cross-examination of the witness that all the accused had sat over the back of his father who had been assaulting him. This part of assertion made by the witnesses at trial as would appear from evidence of the police officer was contrary to his early statement and complicity of all the accused persons in committing murder of Parmanand Rai appears to have been suggested an evidence with an object to take all of them answerable for the charge under section 396 of the Indian Penal Code.

The testimony of Ashok Rai (P.W.2) about Jagadhar Rai tying hands of Parmanand Rai and Ramjatan Rai tying the legs was quite in accordance with the prosecution version suggesting overt act committed by them. Though his evidence about complicity of Hirday Rai



had been that he cautioned him to slip else he would be killed. Opposed to the early version of Gurcharan Rai which was sheet anchor of the prosecution case , other accused persons were also sought to be involved in killing Parmanand Rai. Evidence of P.W.1 on this score had been that Ramchandra Rai and Jai Sharan Rai had been pulling Gamchha around the neck of Parmanand Rai and similar had been in evidence about Achhay lal Rai”.

22. Mr. Sarwan Kumar referring to the para15 of the judgment submits that there was absolutely no material to indicate that there was enmity between the parties for causing such crime. The attending facts and circumstances of the case does not conclusively establish the place of occurrence and manner of occurrence and as such the appellants deserve benefit of doubt.

23. Learned APP appearing on behalf of the State submitted that the minor contradiction in the version of the prosecution witnesses in their statement before the police and the court does not render the prosecution case under doubt. He submitted that delay of 19 hours is not fatal in the matter of establishing the prosecution case when the evidence on record indicate that appellants have committed the crime.

24. We have heard learned counsel for the parties. We have also gone through the material available on record. On deeper scrutiny of evidence documentary as well as oral evidence, we are of the view that delay of 19 hours in lodging the Fardbeyan creates serious doubt about the prosecution case.



The distance of police station from the place of occurrence is only five kilometers, yet no one has bothered to inform the police about the occurrence and delay of 19 hours in lodging the Fardbeyan creates serious doubt about the prosecution story. We find no motive attributed for commission of crime either in the First Information Report or in the trial and on scrutiny of the evidence particularly with reference to the deposition of the P.W.-4 and the ocular evidence, we find that the story of tying neck and pulling away of the deceased by the appellants does not find support by post-mortem report. The doctor's opinion is very specific that there was no ligature mark which rules out possibility of strangulation. The injury found by the doctor on the deceased could have been caused by only hard blunt substance and such injury cannot be caused by 'Dhoti' and thus the story of assault projected by the prosecution is not supported by medical evidence. In addition thereto, we find that the earlier version before the police stands substantially improved in the trial to introduce new case by the informant that he was present at the place of occurrence. The deposition of witnesses before the court stands contradicted by the I.O. who in his deposition has categorically stated that before the police no such statement was made by the witnesses and the aforesaid contradiction and



introduction of new story in the trial creates serious doubt about the prosecution case.

26. In addition thereto, during the course of examination of the accused under section 313 of the Cr.P.C. it is seen that the trial court has not followed the mandatory provisions of Section 313 of the Cr.P.C. while examining the accused persons and instead of confronting the accused persons with all adverse material that has surfaced during the trial only formality was completed by the trial court in asking general question to the accused persons. The aforesaid infirmity also goes to the root of the case.

The judgment of the Apex Court reported in (2014)10 SCC 270 at para 9 to 12 reads as follows:-

1. In this context, we may profitably refer to a four-Judge Bench decision in Tara Singh v. The State wherein, Bose, J. explaining the significance of the faithful and fair compliance of Section 342 of the Code as it stood then, opined thus:

"30. I cannot stress too strongly the importance of observing faithfully and fairly the provisions of Section 342 of the Criminal Procedure Code. It is not a proper compliance to read out a long string of questions and answers made in the committal court and ask whether the statement is correct. A question of that kind is misleading. It may mean either that the questioner wants to know whether the recording is correct, or whether the answers given are true,



or whether there is some mistake or misunderstanding despite the accurate recording. In the next place, it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them.

He must be questioned separately about each material circumstance which is intended to 1 (2009) 6 SCC 595 2 AIR 1951 SC 441 be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must therefore be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is therefore in no fit position to understand the significance of a complex question.

Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand. I do not suggest that every error or omission in this behalf would necessarily vitiate a trial because I am of opinion that errors of this type fall within the category of curable irregularities. Therefore, the question in each case depends upon the degree of the error and upon whether prejudice has been occasioned or is likely to have been occasioned. In my opinion, the disregard of the provisions of Section 342 of the Criminal Procedure Code, is so gross in this case that I feel there is grave likelihood of prejudice."

12. In *Hate Singh Bhagat Singh v. State of Madhaya Bharat*, Bose, J. speaking for a three-



Judge Bench highlighting the importance of recording of the statement of the accused under the code expressed thus:- "8. Now the statements of an accused person recorded under Sections 208, 209 and 342, Criminal P.C. are among the most important matters to be considered at the trial. It has to be remembered that in this country an accused, person is not allowed to enter the box and speak 3 AIR 1953 SC 468 8 Page 9 on oath in his own defence. This may operate for the protection of the accused in some cases but experience elsewhere has shown that it can also be a powerful and impressive weapon of defence in the hands of an innocent man. The statements of the accused recorded by the Committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness-box."

13. The aforesaid principle has been reiterated in Ajay Singh v. State of Maharashtra following terms:

"14. The word "generally" in subsection (1)(b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the



questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give." 4 (2007) 12 SCC 341

14. In view of the aforesaid enunciation of law, there can be no scintilla of doubt that the when the requisite questions have not been put to the accused it has caused immense prejudice to him, more so, when there is no evidence to establish his complicity in the alleged abduction.

27.The cumulative effect of the infirmity in the prosecution case and improbability of causing injury found on the person of deceased by Dhoti which can only be caused by hard blunt substance, no sign of strangulation or ligature mark on the neck of the deceased also ruled out the prosecution case about manner of commission of crime and lack of any motive for commission of crime are serious infirmity which renders prosecution case doubtful. The basic case of commission of crime has not been established in the present case as the appellants has not been found guilty for offence under section 396 during investigation and trial court also not accepted the



prosecution case of commission of offence under section 396 of the IPC, the conviction of the appellants in the aforesaid circumstance is unsustainable. The appeal is accordingly allowed. The judgment of the trial court is set aside.

28.Since the appellants are on bail, they are discharged from the liability of bail bonds.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

Ravi/-

AFR/NAFR	N/A
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