

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.178 of 1995

Arising out of the judgment and order dated 19.06.1995 passed by Sri Kamla Prasad Sinha, learned Sessions Judge, Saran at Chapra in Sessions Trial No. 132 of 1988.

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Chhotelal, son of late Nagina Sah, R/o Village Satua, P.S. Baniyapur, District Saran
..... Appellant/s

Versus

State of Bihar
..... Respondent/s

with

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Criminal Appeal (DB) No. 179 of 1995

Arising out of the judgment and order dated 19.06.1995 passed by Sri Kamla Prasad Sinha, learned Sessions Judge, Saran at Chapra in Sessions Trial No. 132 of 1988.

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1. Rameshwar Chamar, son of Vigal Chamar, R/o Village – Satua, P.S. Baniyapur,
District Saran,
2. Bigal Chamar,
3. Baharan Chamar
Both are sons of Gurdeli Chamar, R/o Village Satua, P.S. Baniyapur, Distt.
Chapra (Saran)
..... Appellant/s

Versus

The State of Bihar
..... Respondent/s

with

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Criminal Appeal (DB) No. 201 of 1995

Arising out of the judgment and order dated 19.06.1995 passed by Sri Kamla Prasad Sinha, learned Sessions Judge, Saran at Chapra in Sessions Trial No. 132 of 1988.

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1. Jugeshwar Chamar S/o Ramrit Chamar,
2. Nanhu Chamar @ Nandu Chamar, S/o Ramrit Chamar
Both residents of Village Satua, P.S. Baniyapur, District Chapra (Saran).
..... Appellant/s

Versus

State of Bihar
..... Respondent/s

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Appearance:



(In CR. APP (DB) No.178 of 1995)

For the Appellant/s : Mr. Ajay Kumar Sharma, Advocate.
For the Respondent/s : Mr. Abhimanyu Sharma, A.P.P.

(In CR. APP (DB) No.179 of 1995)

For the Appellant/s : Mr. Ajay Kumar Sharma, Advocate.
For the Respondent/s : Mr. Abhimanyu Sharma, A.P.P.

(In CR. APP (DB) No.201 of 1995)

For the Appellant/s : Mr. Amish Kumar and
Mr. S.K. Choudhary, Advocates.
For the Respondent/s : 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: 05-04-2018

All these three Criminal Appeals have been preferred by separate set of accused who have been convicted in a common trial being Sessions Trial No. 132 of 1988 vide judgment dated 19.06.1995 passed by the learned Sessions Judge, Saran at Chapra (hereinafter referred to as 'the trial court').

2. Appellant Chhotelal in Cr. Appeal (DB) No. 178 of 1995 has been sentenced to undergo imprisonment for life U/S 302/109 IPC and has been awarded a further sentence of rigorous imprisonment for three years U/S 27 of the Arms Act.

3. Appellants Rameshwar Chamar, Bigal Chamar and Baharan Chamar in Cr. Appeal (DB) No. 179 of 1995 have been convicted separately. Rameshwar Chamar has been sentenced to



undergo imprisonment for life U/S 302 IPC, he has been further sentenced to undergo rigorous imprisonment for a period of 7 years U/S 307 IPC also whereas appellant Bigal Chamar and Baharan Chamar were sentenced to undergo rigorous imprisonment for a period of 9 months U/S 323 IPC.

4. Appellants Jugeshwar Chamar and Nanhu Chamar @ Nandu Chamar in Cr. Appeal (DB) No. 201 of 1995 have been sentenced to undergo imprisonment for life U/S 302 IPC. All the sentences are to run concurrently.

5. Before we proceed to take up the three Criminal Appeals for final disposal, let it be recorded that during pendency of this appeal, appellants Bigal Chamar and Baharan Chamar in Cr. Appeal (DB) No. 179 of 1995 have been reported dead whereas appellant Nanhu Chamar @ Nandu Chamar in Cr. Appeal (DB) No. 201 of 1995 is said to have died and, therefore, the appeals preferred by the deceased appellants stand abated insofar as the same relates to them.

6. We have heard learned counsel representing the appellants in all these appeals as well as learned A.P.P. representing the State.

7. The prosecution case is based on *Fard-e-beyan* (Ext.3) of the son of Pancham Rai, when Pancham Rai son of Chabbo Rai of



Village Sareya, P.S. Baniapur, District Saran was admitted in Baniapur Hospital on 16.03.1987 in injured condition. He alleged that on the occasion of Holi festival on 16.03.1987 around 8 P.M. Pancham had gone to the house of Rudal Mahto of his village to smear Abir to him. Accused Nanhu Chamar, Jugeshwar Chamar, Rameshwar Chamar and others came there and started squabbling with him. It is alleged that Nanhu Chamar and Jugeshwar Chamar assaulted Pancham with lathi over his waist and arm. Accused Rameshwar Chamar pierced Bhala in his abdomen. He fell unconscious and was brought to the hospital, thereafter, the dying declaration (Ext.2) of Pancham Rai was recorded at 11 P.M. in the hospital itself by Anchal Adhikari, Ashok Kumar Jha (PW8). The injured Pancham Rai was medically examined by the doctor in the night itself. Two other injured, namely, Ram Ayodhya Mahto (PW4) and Khush Nain Mahto (PW5) were also having injuries on their person, they were admitted and had been examined by the doctor in the same night.

8. The investigation revealed that the six accused persons had come to the house of Rudal Mahto, Chhotelal was allegedly armed with gun. He fired gun shot aiming at Pancham Rai but it did not hit any body. Khush Nain Mahto and Ram Ayodhya Mahto intervened. Khush Nain is said to have struck lathi blow on the gun of



Chhotelal which broke the butt of the gun. Chhotelal thereafter ordered Rameshwar to pierce Bhala and Bhala was pierced in the abdomen of Pancham Rai. Accused Bigal and Baharan struck Khush Nain Mahto with lathi. Ram Ayodhya Mahto was also struck by Bhala on his back by accused Rameshwar. He also fell down and became unconscious and later on he was brought to the hospital. The following day Pancham Rai died. His post-mortem examination was held by Dr. B.N. Mishra on 18.03.1987 at 12:00 Noon.

9. After investigation, the Investigating Officer submitted a charge sheet against six accused persons, three of them were named in the *Fard-e-beyan* of the deceased and three were not named in the *Fard-e-beyan* of the deceased. Three accused persons Rameshwar Chamar, Nanhu Chamar and Jugeshwar Chamar were charged U/S 302/34 IPC. Rameshwar Chamar was further charged U/S 307 IPC whereas accused Bigal Chamar and Baharan Chamar (both since deceased) were charged U/S 323 IPC. Accused Chhotelal was discharged finding no evidence against him by order dated 06.06.1988 but later on he was also made accused in accordance with Section 319 Cr.P.C.

10. The learned trial court found that the prosecution had examined 9 witnesses, out of them PW3 Prem Shankar Sah was tendered. PW6 laldhari Mahto and PW7 binda Mahto have been



declared hostile. PW8 Ashok Kumar Jha, Anchal Adhikari, is a formal witness who has recorded the dying declaration of Pancham Rai (Ext.2). The other witnesses were PW1 Rudal Mahto, PW2 Dr. Rabindra Nath Rai, PW4 Ram Ayodhya Mahto, PW Khush NainMahto, PW6 Laldhari Mahto, PW7 Binda Mahto and PW9 Nagendra Prasad Sinha, who was the Investigating Officer of the case.

11. The prosecution witnesses supported the prosecution case and they are said to have narrated the time of occurrence, place of occurrence and manner of occurrence. PW1 Rudal Mahto has narrated the story of the occurrence as an eye witness who has been found quite consistent in his deposition. The trial court noted that the only fact which had been brought on the record by cross-examination of this witness and that of the Investigating Officer (PW9) is that the statement of the witness with regard to the occurrence before the Investigating Officer was absolutely different. He had not stated to the Investigating Officer about the presence of accused Jugeshwar and Nanhu at the P.O. He had stated the I.O. that on the date of occurrence he along with Laldhari and Pancham was taking toddy from 8:00 P.M. at his Darwaza and the Investigating Officer had seized two Labnis and two glasses from the P.O. but in course of trial he denied to have made such statements. He further stated to I.O. that Rameshwar accompanied by Prem Shankar Sah had come to his place



from the side of Village Sareya. Rameshwar started applying Abir and cutting joke with Pancham. This witness had not stated to the police that Chhotelal was also with accused Rameshwar and Chhotelal had fired gun aiming at Pancham Rai as asserted in the court.

12. The trial court found that if the statement of the witness made before the Investigating Officer is relied upon, the whole substantive evidence on oath thoroughly tested in cross-examination has to be brushed aside. The Investigating Officer has tried to show in the statement of this witness that even accused Jugeshwar and Nanhu, who have been named by the deceased in his *Fard-e-beyan* and in the dying declaration as his assailants, were not seen by the witness at the P.O. This witness has not admitted that he had stated to the Investigating Officer not to have seen them. The learned trial court, however, disbelieved the case diary saying that the case diary appears to be tainted document and cannot be relied upon. According to the learned trial court, the Investigating Officer did not appear to be sincere, faithful and honest in the investigation of this case and reliance on the recording of the statements of witnesses by the Investigating Officer would be prejudicial to the interest of justice.

13. The trial court thereafter discussed the evidence of Ram Ayodhya Mahto (PW4), who had sustained injuries at the time of occurrence and has been found a natural and competent witness. He



saw accused Chhotelal, Rameshwar, Bigal, Baharan, Nanhu and Jugeshwar. They were abusing Pancham Rai. This witness has stated that accused Rameshwar struck Pancham Rai with Bhala which hit him in the abdomen on the right side. Rameshwar also struck him with Bhala on his back. The trial court found that from the description of the place of occurrence it appears that the Godown and the Darwaza are adjacent to each other and when PW4 reached there he found 4 to 5 persons of his village and, in his presence, Pancham was struck by Bhala first, he was thereafter struck by lathi by accused Nanhu and Jugeshwar. This witness was struck by Bhala thereafter. He has been found to be consistent in his cross-examination. Again the trial court found that the attention of this witness had been drawn towards his statement made before the police to impeach his credibility. It was pointed out that there was no statement of this witness before the police about the participation of accused Jugeshwar and Nanhu in the occurrence as asserted in the court. His statement before the police was that hearing Hulla he went to the Darwaza of Laldhari (near the Darwaza of Rudal Mahto). His further statement about the accused Chhotelal Rai is that he neither fired from his gun nor took part in the assault.

14. Similarly the deposition of Khush Nain Mahto (PW5) has been discussed by the learned trial court. In the case of this



witness also, the defence relied upon his statement recorded by the Investigating Officer with a view to discard his testimony. The Investigating Officer had recorded a totally different version given to him by this witness in course of investigation.

15. The learned trial court discussed the medical report and the post-mortem report as also the dying declaration of the deceased and rejected the contention of the defence that even though Dr. Rabindra Nath Rai was said to be present at the time of recording of the dying declaration but the formal witness Ashok Kumar Jha, the Circle Officer who was recording the dying declaration, did not obtain any certificate from the doctor to the effect that Pancham Rai was in a physical and mental condition to make his statement.

16. Having taken note of the injuries which were found by Dr. Rabindra Nath Rai, who was the Civil Assistant Surgeon and the evidences discussed above, the learned trial court recorded the order of conviction, as stated above.

SUBMISSIONS

17. On behalf of the appellant Chhotelal, it is contended that learned Sessions Judge has wrongly relied upon the evidence of Dr. B.N. Mishra whose deposition was recorded prior to the order passed by learned Sessions Judge U/S 319 Cr.P.C. It is his contention that the accused Bigal and Baharan are alleged to have caused injuries



no. 2 and 3, as deposed by P.W.2 Dr. Rabindra Nath Rai the injuries were simple in nature and there is no evidence that injury no. 2 and 3 contributed to the death of Pancham Rai. Learned counsel further submits that the evidence of P.W.1 and P.W.5 are highly contradictory and the learned trial court despite having noticed the contradictions convicted the appellants without there being an unimpeachable piece of evidence.

18. On behalf of the appellant Rameshwar it is submitted that out of 9 prosecution witnesses examined on behalf of prosecution, P.W.3 was tendered while P.W.6 and 7 did not support the prosecution version and were declared hostile. P.W.8 is a formal witness. P.W.9 and P.W.4 were examined as eye witnesses P.W.2 is a Medical Officer, who had examined the injuries on the persons of P.W.4, P.W.5 and injured Pancham who subsequently died. According to learned trial court there was no evidence direct or circumstantial to substantiate the charge under Sections 302/34 I.P.C. hence accused were acquitted of that charge but three of them have been held guilty under Sections 302 of the Indian Penal Code. It is also submitted that P.W.1 and P.W.4 had sustained injuries but it could not be shown that they sustained injuries during the alleged occurrence, moreover the circumstances show that Pancham Rai was injured in a drinking brawl on the occasion of Holi festival. The



learned trial court ought not to have relied upon Ext.2 the dying declaration and Ext.3 *Fard-e-beyan* as dying declaration does not bear signature of any authority of hospital.

19. On behalf of the appellant Jugeshwar, in addition to above submissions it is contended that I.O. had seized Labni and glasses giving smell of toddy, there is no evidence on record that accused had pre-planned and had prior meeting of mind to cause death of Pancham Rai.

20. On the other hand learned A.P.P. representing the State submits that the learned trial court has rightly appreciated the evidences available on the record. It is submitted that the dying declaration was recorded by a responsible officer of the State, such as, Anchal Adhikari and it has been recorded in presence of Dr. R.N. Singh, therefore, there is no reason to disbelieve or attach lesser evidentiary value to the dying declaration.

21. Learned A.P.P. submits that the injuries found on the body of the deceased Pancham Rai have been taken note of by the learned trial court in paragraph 29 of the impugned judgment wherein it has been found that the injury no. 1 was caused by a sharp-penetrating weapon, may be Bhala, and injuries no. 2 and 3 were caused by a hard and blunt substance, such as, lathi. Injury no. 1 was grievous in nature and dangerous to life whereas injuries no. 2 and 3



were simple in nature. It is thus submitted that on the basis of the materials available on the record, the learned trial court has rightly convicted all the appellants.

22. Having heard learned counsel for the appellants in all the three Criminal Appeals and learned A.P.P. for the State as also on perusal of the materials available on the record we find that the occurrence in question has taken place at the house of PW1 Rudal Mahto. Rudal Mahto, in his statement to I.O. is said to have stated that on the occasion of Holi they were taking toddy which he denied in course of trial. Appellants Rameshwar, Bigal, Baharan, Chhotelal, Jugeshwar and Nanhu came there and a quarrel started with Pancham. Ramewshwar gave a Bhala blow in the stomach of Pancham. He stated that Chhotelal had ordered to kill. Chhotelal was lashed with gun, he fired but the shot did not hit anybody. It appears from perusal of the evidence of PW1 that on the occasion of Holi he along with Pancham had assembled there but he denied that they had consumed toddy. He has denied the statement recorded by the Investigating Officer that on the date of occurrence he along with Laldhari and Pancham were taking toddy and were smearing Avir to each other. In his cross-examination he has denied that there was any prior enmity with the accused persons. He has further denied his statement recorded by the Investigating Officer that Rameshwar had started



smearing Avir and playing jokes with Pancham.

23. PW2 Dr. Ravindra Nath Rai was examined and he proved the injury report. From the record it appears that he was examined and cross-examined on 11.09.1989. Regarding the condition of the injured Pancham Rai he has stated that the condition of the patient may be known from the Bed Head Ticket. He has written in his injury report also about his condition.

24. PW4 Ram Ayodhyaya Mahto has supported the case of the prosecution stating that Rameshwar had given Bhala blow to Pancham Rai, Pancham Rai fell down to the ground, thereafter Rameshwar gave Bhala blow on the back of this witness. Bigal and Baharan had given lathi blow to Khushnain Mahto. In his cross-examination this witness stated that he reached at the place of occurrence after hearing Hulla. Pancham Rai had received assaults. He has further stated that Nandu and Jugeshwar had assaulted him by lathi. In his cross-examination he has denied that he had made any statement before the Investigating Officer that Rameshwar was playing Holi in an intoxicated condition. He has also denied that he had made a statement to the Investigating Officer that the occurrence had taken place on the occasion of Holi festival in intoxicated condition. He has also stated that he had not told the Investigating Officer that Rameshwar had given a Bhala blow on his back.



25. PW5 Khushnain Mahto has deposed that Chhotelal Rai had ordered Rameshwar to give Bhala blow then Rameshwar gave a Bhala blow to Pancham Rai in his stomach. This witness was assaulted by Bigal. In his cross-examination he has stated that after receiving assault he had become unconscious.

26. PW8 is Ashok Kumar Jha, Anchal Adhikari, who had recorded the dying declaration of the deceased Pancham Rai. He has stated that Pancham Rai was in a condition to give his statement when he was called in Baniapur Government Hospital on 16.03.1987 at 11 P.M. He has further stated that the statement of Pancham Rai was recorded by him in his own hand-writing on which the thumb impression of Pancham Rai was taken. The dying declaration has been proved by him as Ext.2. In his cross-examination, he has stated that after recording dying declaration he kept the same in his own possession and sent it to the Chief Judicial Magistrate, Chapra on 18.03.1987. He had recorded the statement of the deceased of this case on the request of the Officer-in-charge, Baniapur Police Station, however, the said request letter was not brought on record by way of evidence. He did not prove his statements made before the Investigating Officer, however, he has admitted that on the dying declaration there is no signature of any officer of the hospital. He has stated that when he was recording statement of the deceased, the In-



charge Dr. R.N. Rai was present but he had not taken any certificate from the doctor as to whether Pancham Rai was in a position to give his statement. He has also stated that in the dying declaration while recording he has not recorded that the injured Pancham Rai was in a condition to give his statement. There is no signature of any other witness on the dying declaration. He has stated that at the time of recording the dying declaration, except him and the doctor, nobody else was there.

27. The evidence of Dr. R.N. Rai (PW2) states that on 16.03.1987, at about 11:35 P.M., he had examined the injured Ram Ayodhya Mahto and on the same day and about the same time he had examined Pancham Rai (the deceased). The patient was in shock and restless condition.

28. On a reading of evidences of PW8 and PW2 we find that the dying declaration (Ext.2) has not been properly recorded, there was no certification of the doctor that Pancham Rai was in a position to give his statement, rather the deposition of PW2 is that he was in shock and restless condition. The fact that the dying declaration did not contain signature of any witness and the same was kept in his own possession by PW8 for two days create a doubt on the veracity of Ext.2. We are thus of the opinion that it would not be safe to attach any evidentiary value to Ext.2.



29. The learned trial court has taken a view that the Investigating Officer was not honest, sincere and faithful in the investigation and in the recording of the statements of the witnesses. Certain facts deposed by him in his evidence, according to the learned trial court make the investigation all the more unreliable. The Investigating Officer had though stated that he had found Labni and Glasses giving smell of toddy from the place of occurrence but no seizure list was prepared.

30. On a complete reading of the evidenced available on the record we find that so far as the appellant Chhotelal is concerned, the prosecution witnesses have not alleged any overt act against him. In the *Fard-e-beyan*, the allegations are against Nanhu Chamar, Jugeshwar Chamar and Rameshwar Chamar. Similarly, the witnesses have alleged that Bigal Chamar and Baharan Chamar had given lathi blow but both of them died and, therefore, the appeal preferred by them has stood abated.

31. In another appeal, Nanhu Chamar against whom there are allegations in the *Fard-e-beyan* has also died.

32. So far as Jugeshwar Chamar is concerned, in the *Fard-e-beyan* even though it is stated that he was there and is said to have given lathi blow but the prosecution witnesses are not consistent against him. PW1 has not named Jugeshwar Chamar as having given



any assault either to the deceased Pancham or to Ram Ayodhya Mahto. Similarly, PW4 in his deposition has not attributed any assault on the injured by Jugeshwar Chamar. The witnesses are, however, saying that Rameshwar had given Bhala blow.

33. We are of the opinion that there is in fact no evidence against Chhotelal Chamar and Jugeshwar Chamar to hold them guilty for the offences U/S 302/109 IPC. Even if it is accepted that they were present at the place of occurrence, it was an occasion of Holi festival where mere presence of some persons would not make them guilty of a case U/S 302/109 IPC. The prosecution witnesses have not come out with a proved case against Jugeshwar Chamar and Chhotelal Chamar. Thus, their conviction U/S 302/109 IPC and further conviction of Chhotelal U/S 27 of the Arms Act is hereby set aside and they are acquitted of the charges against them.

34. So far as Rameshwar Chamar is concerned, even though we discard the dying declaration we find that the *Fard-e-beyan* and the evidence of the prosecution witnesses are consistent against him to prove the fact that he had given a Bhala blow in the abdomen of the deceased Pancham Rai which proved fatal and it was because of that injury which was grievous in nature, the injured Pancham Rai succumbed to his injuries and died.

35. Learned counsel representing the appellant Rameshwar



Chamar has also submitted before us that the case of Rameshwar Chamar may also be considered from another point of view that it was the Holi festival, there are contradictory statements of the witnesses on the fact as to whether they were in intoxicated condition or not. PW 1 and 4 have denied their statements made before the Investigating Officer as regards the fact that on the Holi festival they had consumed toddy and in an intoxicated condition the occurrence had taken place. The evidences of PW 1 and 4 on this issue are highly contradictory, further Rameshwar Chamar has spent more than 7 years in jail and there is no evidence that he had intention to kill Pancham Rai, the occurrence took place on the occasion of Holi festival all of a sudden on some petty issues, therefore, his conviction may be reduced to Section 304 Part II of the Indian Penal Code.

36. We find force in the statement of learned counsel representing the appellant Rameshwar Chamar that it was the Holi festival where the quarrel is said to have broken between the parties, the Bhala blow not repeated and the assault has taken place in the heat of the moment without there being any intention to kill Pancham Rai. We find no evidence on the point of intention or motive to kill. There was no prior enmity between the parties. We, however, find that the appellant Rameshwar Chamar must be attributed with knowledge that the Bhala injury may cause death in ordinary course of nature,



therefore, he is liable to be convicted under Section 304, Part II of the Indian Penal Code.

37. In these circumstances we reduce the order of conviction in respect of the appellant Rameshwar Chamar to one under Section 304 Part II IPC and having taken note of his incarceration for over seven years, reduce the sentence to the period undergone.

38. The appeal in respect of the appellant Rameshwar Chamar is partly allowed.

(Rajendra Menon, CJ)

(Rajeev Ranjan Prasad, J)

Dilip, AR

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