

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No. 334 of 1994

Arising Out of PS.Case No. -null Year- null Thana -null District- KATIHAR

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1. Md. Rakib Khan, son of Md. Rauf Khan

2. Md. Galib Khan, son of Md. Rauf Khan

Both resident of Village-Officer Colony, Budha Chak, P.S. Korha,
District Katihar.

.... Appellants

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant/s : Mr. Ramesh Chandra Sinha, Adv.
Mr. Rakesh Kumar Sinha, Adv.

For the State : Mr. Shivesh Chandra Mishra, A.P.P.

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**CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA**

and

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA)

Date: 10-08-2018

1. This criminal appeal has been preferred against the judgment of conviction and sentence order dated 28.05.1994 passed by learned 2nd Additional Sessions Judge, Katihar in Sessions Trial No. 237 of 1992 by which and whereunder he convicted both the appellants for the offence punishable under Section 302 of the Indian Penal Code and sentenced them to undergo imprisonment for life. However, the learned Additional Sessions Judge-2nd, Katihar acquitted the appellants of the charge framed under Section 396 of the Indian Penal Code and similarly, acquitted three other



accused of the above stated charge.

2. PW-7, namely, Sarjug Pd. Bhagat gave his fardbeyan to police on 19.07.1991 at 1.30 A.M. at Sadar Hospital, Katihar in presence of Md. Salim Khan (PW-3), Md. Basir Khan and Ram Sarup Yadav to this effect that two and half years ago, his wife, namely, Sushila Devi had purchased 15 dhur land from Rauf Khan and got constructed her house over the said land. Subsequently, she got certified copy of registered sale deed and came to know that the aforesaid Rauf Khan had given land to her towards east side though the sale deed was executed for the land of west side. The PW-7 further stated that on 18.07.1991 at about 01:00 P.M, he had gone to Katihar Court to attend his case where hot exchange of words took place between him and Rauf Khan and after that Rauf Khan had given threatening to him . He further stated that on 18.07.1991 at about 10 P.M., he along with his wife, namely, Sushila Devi came out of their house to urinate but the above stated appellants along with Rauf Khan, Md. Sabir Khan, and Abid Khan came there and accused Rauf Khan ordered the others to assault him and his wife whereupon, appellant Rakib Khan started assaulting his wife Sushila Devi by means of dagger. Accused Sabir Khan was armed with gun. PW-7 further stated that he took to his heels. On alarm, villagers came there. His wife having sustained injury, fell down there. He further stated that the aforesaid persons looted the belongings of his house and fled away from there with looted booty. The villagers



witnessed the occurrence.

3. On the basis of aforesaid fardbeyan of PW-7, Korha P. S. Case No. 137 of 1991 was registered and formal FIR was drawn up against the appellants and three others for the offence punishable under Sections 302\34 and 380 of the Indian Penal Code. After investigation, charge-sheet was submitted and subsequently, the appellants and three others were put on trial and stood charged for the offences punishable under Section 302 read with Section 149 and Section 396 of the Indian Penal Code. The appellants and other accused denied the charges and claimed to be tried.

4. In course of trial, the prosecution examined, altogether, 12 witnesses and also got exhibited some documents. The statements of appellants and other accused were recorded under Section 313 of the Cr. P. C in which they again denied the prosecution story. The appellants and other accused got examined three defence witnesses in support of their defence and also got exhibited some documents.

5. The learned trial court having analyzed the evidences available on the record convicted the appellants in the manner as we have already stated.

6. Learned counsel appearing for the appellants challenged the impugned Judgment of conviction and sentence order arguing that the learned trial court failed to properly appreciate the evidences available on the record and also failed to take note of this fact that the prosecution



witnesses made contradictory statements in respect of manner of the occurrence. Learned counsel further submitted that the learned trial court also failed to take note of this fact that the dead body of deceased was not identified by any of her family members and moreover, the doctor, who conducted the post-mortem on the dead body of deceased, has, nowhere, stated that the injuries found on dead body were sufficient to cause her death in ordinary course of nature. He further submitted that not a single independent witness came forward to support the prosecution story and the so-called eye-witnesses are either family members or henchmen of the PW-7. He further submitted that the appellant no. 2, namely, Md. Galib Khan was juvenile at the time of alleged occurrence but unfortunately, the plea of juvenility on his behalf could not be taken before the trial court and for the first time, the plea of juvenility on behalf of the appellant no. 2, namely, Md. Galib Khan was taken before this court. He further submitted that this court directed the Juvenile Justice Board, Katihar to make an enquiry regarding the claim of juvenility of appellant no. 2 vide order dated 09.04.2018 and Juvenile Justice Board, Katihar vide his letter no. 406/18 reported that appellant no. 2, namely, Md. Galib Khan was juvenile at the time of alleged occurrence. Learned counsel further submitted that the appellant no. 2 was tried along with other accused who were not juvenile and, therefore, the entire trial of appellant no. 2 is vitiated due to aforesaid illegality.



7. On the other hand, learned Additional Public Prosecutor supported the impugned judgment of conviction and sentence order arguing that PW-1, PW-4, PW-6 and PW-7 claimed themselves to be eye-witness of the alleged occurrence and they very clearly stated that appellant no. 1 gave several dagger blows to deceased whereas appellant no. 2 caught hold the deceased at the time of alleged occurrence and, therefore, the statements of aforesaid eye-witnesses clearly prove the participation of the appellants in the alleged crime. Learned Additional Public Prosecutor further submitted that the post-mortem report of the deceased goes to show that altogether 13 injuries were found on the person of deceased and most of the injuries were on vital part of the body of the deceased and, therefore, the aforesaid fact clearly goes to show that the injuries found on the person of the deceased were sufficient to cause death of the deceased in ordinary course of nature.

8. Having heard the rival contentions of both the parties, we went through the record. We have already stated that, altogether, 12 prosecution witnesses have been examined in this case. Out of aforesaid 12 prosecution witnesses, PW-1 Nilam Kumari, PW- 4 Nutan Kumari and PW- 6 Punam Kumari are daughters of deceased Sushila Devi and all the aforesaid witnesses claimed that they were in their house at the time of alleged occurrence and having heard the cry of their mother, they came out of the house and saw the appellant Md. Rakib Khan assaulting their mother by means of dagger and at that time appellant no. 2 Md. Galib Khan had



caught hold their mother.

9. PW-9 Ram Kishore Choudhary states that at the time of alleged occurrence he was in his house and heard noise. This witness further states that having heard the noise, he went towards the house of deceased Sushila Devi and saw the appellants and three others running. This witness further states that he found Sushila Devi in injured condition lying in a field and at that time Sushila Devi was alive.

10. PW-7 Sarjug Pd. Bhagat is the informant and husband of the deceased Sushila Devi. This witness states that at the time of alleged occurrence, he along with his wife Sushila Devi was at their home and at about 10 P.M., they came out of the house to urinate but in the meantime, appellants along with three others came there and on the order of accused Rauf Khan, appellant no. 1 Rakib Khan gave dagger blow to Sushila Devi. This witness further states that he started fleeing from there raising alarm which attracted Ram Kishore Chaudhary (PW-9), Nasir (PW-5), Salim (PW-3), Kailu Yadav (PW-2) and his three daughters i.e. PW-1 Nilam Kumari, PW-4 Nutan Kumari and PW-6 Punam Kumari.

11. PW-2 Kailu Yadav has been declared hostile but this witness, at least, admitted to this extent that on the alleged date of occurrence at about 10:00 P.M., a woman was groaning lying on a cot.

12. PW-3 states that on the alleged date of occurrence having heard the noise, he went near the house of Sushila Devi and found her lying



in injured condition in a field. This witness at para 3 of his cross-examination, admitted that Ram Kishore Chaudhary (PW-9) had arrived on the place of occurrence before his arrival.

13. PW-5 Md. Nasir states that when he reached at the house of Sushila Devi, he found her in unconscious state in her house and she had sustained injury.

The evidence of the aforesaid prosecution witnesses goes to show that on the alleged date of occurrence, the deceased Sushila Devi had sustained injury and she was lying in a field which was situated near her house.

14. PW-8, Dr. Amrendra Jha states that on 19.07.1991, he did post-mortem examination on the corpus of deceased Sushila Devi, wife of Sarjug Pd. Bhagat. This witness further states that the dead body was identified to him by Om Prakash Thakur Havaladar, C. John Chandlua and some others. This witness further states that he found following ante mortem injuries on the person of deceased :-

1. 1"x ½" x bone deep sharp cut penetrating injury on front of chest.
2. 1 ½"x ½"x3" deep sharp cut penetrating injury on right side of chest below exile.
3. ½"x ¼"x skin deep sharp cut penetrating injury on left side of chest below shoulder.
4. 1 ½"x ½"x 2 ½" deep sharp cut penetrating injury on left side of chest on the left axillary liver.
5. 2"x1"x bone deep sharp cut injury on left arm.



6. 1"x ½"x ¼" sharp cut on left side of back scapular area.
7. ½"x ¼"x ¼" sharp cut on left side of back scapular area.
8. 1 ½"x ½"x1" sharp cut penetrating wound on left side of back below the scapula.
9. 2"x1"x3" sharp cut injury on right side of the back on scapular area.
10. 1"x ½"x1" on right side back below the injury no. 9.
11. ½"x ¼"x ½" sharp cut injury on right leg.
12. ½"x ½"x2" sharp cut injury on right thigh.
13. 1 ¼"x ½"x4" sharp cut injury on right pelvic region.

On dissection: - Skull-NAD, Chest-both chambers of heart empty. Both lungs punctured and collapsed. Abdomen-½ litre (approx.) blood and blood clots penetoneal cavity. Small injury ½"x ¼" on right pelvic region.

This witness further states that he found 4/5 ounce of partially digested fluid. This witness states that death was caused due to shock and haemorrhage on account of above stated injuries.

The evidence of PW-8 as well as exhibit 2, the post-mortem report of deceased establish this fact that the deceased had sustained injury caused by sharp cutting weapon and the cumulative effect of the aforesaid injuries was sufficient to cause the death of the deceased.

15. PW-10 is investigating officer. This witness states that on 19.07.1991, he got fardbeyan of PW-7 from the constable of Town police station. This witness further states that he took the charge of investigation



and inspected the place of occurrence. This witness further states that the place of occurrence was the house of deceased Sushila Devi. This witness describes the topography of place of occurrence at Para 2 of his deposition. This witness further states that the house of PW-9, Ram Kishore Choudhary was at the distance of 100 yards towards eastern side from the place of occurrence whereas the house of appellants and other accused persons was at the distance of 100 yards towards southern side from the place of occurrence. The above stated evidence goes to show that the house of PW-9 as well as house of appellants and other accused were adjacent to the place of occurrence. This witness found blood at the entrance of the house of the deceased and he seized the blood and prepared seizure list. This witness claims that he recorded the statement of witnesses. This witness further states that he had seized one torch from the place of occurrence and prepared seizure list.

The evidence of aforesaid witness clearly establishes this fact that the occurrence took place at the door of deceased and there is nothing in the deposition of PW-10 to disbelieve his evidence.

16. PW-1 Nilam Kumari in her examination-in-chief claims that when she woke up on noise, she saw the appellant no. 2 who had caught the neck of her mother whereas appellant no. 1 was assaulting her mother by means of dagger and both the aforesaid appellants dragged outside her mother from the house where the appellants and three others assaulted her



mother. PW-1 further claims that when her sister, namely, Nutan Kumari (PW-4) flashed torch, the appellants and others fled away. She also claimed that the aforesaid persons committed dacoity in her house. On being cross-examined by the defence, this witness admits that she along with her other sisters and brother went near the hand-pump (Chapakal) and from there the torch was flashed. This witness further admits that she had seen eight to nine persons who had covered their faces. This witness further states that her father was standing at the distance of 10 to 15 hands from the place where her mother was being assaulted by the appellants and others. This witness further admits that she gave her statement for the first time before the court and her statement was never recorded by the police.

The above stated evidence of PW-1 reflects that in course of investigation, her statement was not recorded by the police and for the first time, she made her statement in court in course of trial and she claimed herself to be eye-witness of the alleged occurrence.

17. PW-4 Nutan Kumari claims that she along with her two sisters were sleeping in the house and on the cry of her mother, she along with her sisters woke up and came out of the house. She further claims that she identified appellants in the light of torch and saw appellant no. 2 who had caught hold her mother whereas appellant no. 1 was assaulting her mother by means of dagger and they dragged her mother towards southern side where the other accused were present and all the persons started



assaulting her mother. This witness at Para 5 of her examination-in-chief stated that the above stated torch was handed over to police by her father. On being cross examined by the defence, she stated that at the time of alleged occurrence, she along with her two sisters were sleeping inside the house whereas her parents were sleeping on Varanda of house. She again stated in her cross-examination that she identified the appellants and others in the light of torch. She further stated that when she flashed torch, the appellants and other accused were standing at the distance of 20 to 25 hands.

18. Almost similar statement has been made by PW-6, Punam Kumari. This witness states that she saw appellant Rakib Khan who was assaulting her mother and took her mother in a field. This witness further claims that appellant Galib Khan had caught her mother from behind whereas the remaining accused were assaulting her mother. She further claims that she had identified the appellants and others in the light of torch. This witness has also been cross examined but there is nothing in her cross examination on the basis of which the statement of this witness could be disbelieved.

19. Learned counsel appearing for the appellants challenged the credibility of PW-1, PW-4 and PW-6 on the ground that the aforesaid prosecution witnesses were children at the time of alleged occurrence and, therefore, no reliance can safely be placed upon the deposition of aforesaid



witnesses as there was every possibility to tutor them. Admittedly, PW-1 was aged about ten years, PW-4 was aged about fifteen years and PW-6 was aged about fourteen years at the time of their respective examination and, therefore, it is not in dispute that they were not children at the time of alleged occurrence but there is nothing on the record to show that they were tutored as no question in respect of the aforesaid fact was put by the defence to them at the time of their cross examination.

20. The above stated scrutiny and discussions of the prosecution evidences clearly establish this fact that the appellants participated in the alleged crime and committed the murder of the deceased and the prosecution succeeded to prove its case beyond all shadow of reasonable doubt. Therefore, in our view, learned trial court rightly convicted the appellants for the offence punishable under Section 302 of the Indian Penal Code.

21. No doubt, the appellant no. 2 Md. Galib Khan was juvenile at the time of alleged occurrence as the Juvenile Justice Board, Katihar found and declared him juvenile at the time of alleged occurrence. It is also an admitted position that plea of juvenility on behalf of appellant no. 2 was never taken before the trial court and for the first time, the above stated plea was taken before this court. No doubt, a juvenile cannot be tried along with major accused but even if a juvenile is tried with a major accused, then also, the same is only an irregularity and on account of the aforesaid irregularity,



the entire trial of a juvenile cannot be vitiated. However, no juvenile can be sentenced to death or for life imprisonment without the possibility of his release for any offence. The juvenile shall be treated in accordance with Section 18 of Juvenile Justice (Care and Protection of Children) Act, 2015 and Clause (g) of the aforesaid section says that a juvenile can be sent to a special home, for such period, not exceeding three years.

22. The appellant no. 2 during course of trial as well as during pendency of this appeal remained in jail custody for near about nine months ten days. The present occurrence took place in the year 1991 and at the time of occurrence the appellant no. 2 was aged about 14 years 3 months and he has already been declared juvenile. Therefore, in our view, in the interest of justice, the appellant no. 2 Md. Galib Khan be awarded sentence to the period already undergone by him.

23. On the basis of aforesaid discussions, in our view, it would not be proper to interfere into the impugned judgment of conviction of appellants and impugned sentence order of appellant no. 1 Md. Rakib Khan but so far as the impugned sentence order of appellant no. 2, namely, Md. Galib Khan is concerned, his sentence is modified to the extent of period already undergone by him. Accordingly, this criminal appeal stands dismissed with modification in sentence order of appellant no. 2 Md. Galib Khan to the extent as stated above. The appellant no. 1 is on bail. His bail bond stands cancelled. He is directed to surrender before the trial court



within six weeks from the date of receipt/production of copy of this judgment to serve out his sentence, failing which the trial court shall take necessary steps to procure the remand of appellant no. 1 Md. Rakib Khan so that he could serve out his sentence.

(Hemant Kumar Srivastava, J)

(Rajendra Kumar Mishra, J)

SHAHZAD/-Rajeev

AFR/NAFR	A.F.R.
CAV DATE	N.A.
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