

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.381 of 1995

1. Sita Yadav son of Lekha Yadav
2. Birendra Yadav son of Sita Yadav
3. Nand Yadav, son of Muneshwar Yadav
all R/o village- Dularua Bigha, P.S.- Silao, District- Nalanda
... .. Appellants

Versus

The State of Bihar. Respondent

Appearance :

For the Appellant/s : Mr. Sweety Sinha, Advocate (Amicus Curiae)
For the Respondent/s : Mr. Kamla Prasad

CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 05-07-2018

This criminal appeal has been preferred for setting aside the judgment of conviction and sentence dated 20th and 21st November, 1995 passed by 7th Additional Sessions Judge, Nalanda at Biharsharif (hereinafter referred to as the Trial Court) in Sessions Trial No. 107 of 1994. By the impugned judgment the learned trial court after convicting the accused Birendra Yadav, Nand Yadav and Sita Yadav for committing murder of the deceased Om Prakash Mistri sentenced them to undergo rigorous



imprisonment for life for the charges under Sections 302/34 of the Indian Penal Code.

2. Since no one appeared on behalf of the appellants in course of hearing, we appointed Ms. Sweety Sinha, Advocate as Amicus Curiae to represent the appellants.

3. The prosecution case is based on the fardbeyan of Jagdish Mistri (PW 5) who in his statement made before the S.I., R. B. Singh (PW 9) alleged that while he was sleeping in his house, his son Om Prakash Mistri (deceased) aged about 22 years was sleeping in the hut straw made standing on the eastern part of the roof. It is alleged that about 11.00 p.m. the informant heard a sound of firing on which he along with his family members got awaken and went to the roof where it is alleged that he found his son was shot at by firearm on his head and was bleeding profusely. The informant admits that his son had already died. It is, then alleged that when he looked down the roof with the help of a torch light, he found that the accused Birendra Yadav son of Sita Yadav, Nand Yadav son of Bhuneshar Yadav and Sita Yadav son of Lekha Yadav, all resident of village Dularuwa Bigha, P.S.- Silao, District-Nalanda lashed with pistol in their hands were fleeing away towards eastern side. The informant claimed that he identified the accused persons very well, on hulla a large number of persons



assembled there but the accused persons fled away. On the basis of fardbeyan (Ext. 5) of PW 5 a formal first information report giving rise to Silao P. S. Case No. 373 of 1993 was registered under Sections 302/34 of the Indian Penal Code against all the three named accused persons. After investigation the Police submitted a charge-sheet against all the accused persons, cognizance was taken under Sections 302/34 of the Indian Penal Code and the records were committed to the court of Sessions by the learned Chief Judicial Magistrate, Nalanda at Biharsharif.

4. The accused persons were charged under Sections 302/34 of the Indian Penal Code. They denied their charge and claimed to be tried. The case of the defence was that no such occurrence had taken place, as alleged by the prosecution, and the accused persons have been falsely implicated due to previous enmity.

5. In course of trial, the prosecution examined as many as 9 witnesses whereas on behalf of the defence one witness Mahabir Gope who is a village Chaukidar has been examined. Dr. R. K. Praasad (PW 8) had conducted the post mortem examination of the dead body of the deceased and found the following injuries:

(i) Lacerated wound with black and inverted margin with charring over scalp on left parietal occipital region 1/2”



lateral to mid line of size 1/2" x 1/2" x cavity deep (wound of entry),

(ii) Swelling of left upper eyelid of size 2 1/2" x 1".

Fracture of left occipital and parietal bone of skull was found. One metallic foreign body (like bullet) was found in anterior part of the cavity near orbital bone. Cause of death, according to doctor, was due to shock and haemorrhage of the above noted injuries caused by firearm.

6. After going through the deposition of the prosecution witnesses, the learned Trial Court found that the occurrence is said to have taken place in the night of 19/20.11.1993 at about 11.00 p.m. There is no eye witness saying that the accused persons had caused gun shot injury to the deceased rather the informant Jagdish Mistri (PW 5) and Muneshwar Mistri (PW 2) have only claimed to see and identify the accused in the torch light while all the three accused persons were running away from the place of occurrence through the bamboo made ladder. From the evidence of the informant (PW 5), the learned Trial Court found that in his deposition the informant claimed that when he went on the roof of the house and looked down from the roof he saw accused Birendra Yadav getting down from the bamboo made ladder while rest two accused Nand Yadav and Sita Yadav were standing near the



bamboo made ladder and all the three accused persons armed with country made pistols fled away towards east, regarding motive and cause of occurrence, the informant claimed that about 1 and ½ months prior to the occurrence, there was an alarm and cry sound of theft in village Koryama and at that time, the accused Sita Yadav, Nand Yadav and Birendra Yadav were seen passing through the lane armed with pistols and gun and on that occasion Arjun Mistri had made inquiry about the accused persons passing through the lane and over that matter, quarrel had taken place in between the deceased Om Prakash Mistri and accused persons and due to that incident there was enmity in between the informant, his son and the accused persons.

7. Learned Trial Court also noted that in the night of the alleged occurrence the informant did not give any information regarding occurrence to the Police rather in the morning he called the village Chaukidar through Kuldeep Mistri and then village Chaukidar came, he told him about the incident and then the Chaukidar went to the Police Station and thereafter, the Police came at the place of occurrence at about 12.00 Noon and then the informant narrated the story to the Police, recorded his fardbeyan on the basis of which the case was registered. In course of his cross-examination this witness has stated that there was no any



foot mark on the palani which was attached with the Pucca house, he stated that he had seen blood at the place of occurrence near the dead body. In cross-examination he has stated that he did not produce torch before the Police. PW 1 Arjun Mistri is own nephew of the informant, PW 2 Muneshwar Mistri is own brother of the informant, both witnesses have claimed that in the alleged night of occurrence, they were also sleeping in the ground portion of the place of occurrence and on hearing gunshot firing, when they rushed to the place of occurrence, they had seen and identified the accused persons in torch light running towards east from the place of occurrence. PW 1 and PW 2, however, did not say that they had produce the torch before the Police in course of investigation. PW 4 Ramchandra Mistri is not the eye witness of the occurrence. He has stated that in the night of occurrence, he had gone to village Badgaon for Chatt festival and on the following day at about 10.00 a.m. he returned to his village and visited the place of occurrence and found hue and cry in the house of the informant. He was told about the incident by the informant. In his cross-examination he has admitted that the informant is his cousin. PW 9 Ram Badan Singh happened to be the Investigating Officer of the case who stated that on hearing rumour he visited the place of occurrence on 20.11.1993 and recorded the fardbeyan



of the informant. He has further stated that he found the dead body of the deceased on the roof of the house towards south-east corner in temporary shade. He had prepared the inquest report (Ext. 6) in presence of the witnesses Kuldeep Mistri (PW 6) and Anil Kumar (PW 3) and sent the dead body for post mortem to Biharsharif Sadar Hospital. The Investigating Officer had found the blood mark on the roof of the pucca house of the informant which is the place of occurrence. The Investigating Officer has stated that a bamboo made ladder was also found kept standing having upper portion of ladder attached with straw made palani. The Investigating Officer has stated that he had found blood mark at the place of occurrence and he seized blood stained earth from the place of occurrence. The seizure list was signed by the witnesses Kishori Mistri (PW 7) and Arjun Mistri (PW 1) who have supported the statement of the Investigating Officer. The Investigating Officer has, however, stated that he did not seize bamboo made ladder, no torch was produced before him by the informant or any other witness. The Trial Court, however, says that the Investigating Officer has not stated that he had demanded torch during investigation from the informant and witnesses but the same was not produced.



8. In the aforementioned facts and circumstances, revealed from the evidences of the prosecution witnesses and after taking note of the evidence of Mahabir Gope (DW 1) who is the village Chaukidar, the Trial Court proceeded to consider the prosecution case and by rejecting the plea of the defence that there was much delay in lodging of the first information report and no plausible explanation has been offered by the informant and further that the circumstantial evidences in the present case are not sufficient to reach a irresistible conclusion that the named accused persons in the first information report are guilty of committing the offences alleged against them, learned Trial Court has convicted all the accused who are appellants before us.

9. Learned Advocate (Amicus Curiae), while assailing the impugned judgment, has placed before us the materials available on the record. Learned counsel submits that admittedly, in this case the Trial Court has come to a conclusion that there is no eye witness of the occurrence. No other means of identification except the torch light as claimed by the prosecution have been existing at the place of occurrence. So far as the torch, by which the informant and his two brothers (PW 1 and PW 2) claimed to have identified the appellants, was never produced before the Investigating Officer. The Investigating Officer did not seize the



bamboo made ladder and had not found any foot mark at the place of occurrence. Attention of this Court has been drawn towards the evidence of Chaukidar (DW 1) who has categorically stated that in the morning of 20.11.1995, when he went to the place of occurrence on getting information about the murder of the son of the informant, he had found the dead body lying on the roof of pucca portion of the house towards south-east corner and blood was coming out from the injury. This witness has categorically stated that neither the informant nor any inmates of the house disclosed before him the name of the assailants and then he went to the Police Station and informed the Police.

10. It is submitted that even though the occurrence took place on 19.11.1995 at 11:00 p.m., no information was given either to the Chaukidar of the village or to the Police Station by the informant and/or his family members. It is submitted that in course of evidence PW 1 and PW 2 have claimed that they were also sleeping in the house in question. Therefore, even if it is assumed for a moment that the informant being in a condition of shock due to murder of his son was not in a position to rush to the Police Station, there is no explanation at all as to why the brothers of the informant who are now PW 1 and PW 2 could not inform to the village Chaukidar and the Police. Therefore, it is submitted that



only on the next day at about 12:00 noon when the Police came on information by the Chaukidar (DW 1), the informant made his statement and for the first time disclosed the name of the assailants. It is submitted that in the facts of the present case, the delay in lodging of the first information report is such that it would prove fatal to the case of the prosecution. It is further pointed out that the Investigating Officer has strangely stated in course of his deposition that he had collected the blood stained earth from the place of occurrence. The place of occurrence in the present case is a pucca roof on which a shade (straw palani) was standing in which the deceased was sleeping. Learned counsel submits that the seizure list does not contain any blood stained straw and there was no question of availability of blood stained earth on the pucca roof of the house. It is submitted that the prosecution witnesses who have come forward to identify the accused-appellants are the family members of the informant and closely related to each other, therefore, the evidences of the family members alone on the basis of which conviction has been made by the learned trial court need to be examined with more circumspection and care.

11. On the other hand, learned APP representing the State submits that in view of the consistent evidence on the point of identification, the learned Trial Court has rightly convicted the



appellants. It is submitted that only because the prosecution witnesses are related witnesses, their evidences cannot be thrown out.

12. Having heard learned counsel representing the appellants and the learned Additional Public Prosecutor for the State and after going through the records, we find that in the inquest report (Ext. 6) the dead body has been shown lying in the palani standing on the roof of the house of the informant. It has been prepared on 20.11.1993 at 12:30 p.m. PW 2 and PW 3 have signed the seizure list (Ext. 7) which shows seizure of blood stained earth only. There is no seizure of blood stained straw of which the palani was made. The injuries noted in the inquest report is substantiated by the post mortem report (Ext. 4). In this case there is no eye witness to the alleged occurrence but the appellants have been convicted on the basis of the deposition of PW 1, PW 2 and the informant (PW 5) who are closely related to each other and have claimed that they had identified the appellants while they were standing down the roof and were fleeing away. Neither the informant nor this witness produced the torch by which they claimed to have seen the appellants fleeing away from the place of occurrence. The Investigating Officer says that he had seen the ladder standing attached to the roof but he has not seized



the said ladder. No other means of identification was there at the place of occurrence. In these conditions, given the facts that these three witnesses including the informant are closely related to each other and they themselves claimed enmity with the appellants because of quarrel which had taken place in the past, in our considered opinion, it would not be safe to convict the appellants on the basis of their testimonies.

13. We further find that the conduct of the prosecution in the matter of lodging of the first information report on the next day of the occurrence only when the Police reached the place of occurrence at about 12:00 noon, is not free from doubt. In given facts of the case, the delay of few hours may also be fatal to the case of the prosecution. It is one of those cases where we find that there has been a substantial delay in lodging of the FIR without there being any plausible reason for the same. The village Chaukidar came on his own on the next day in the morning, he has deposed to say that when he came to the place of occurrence, the informant or any other members of his family did not disclose the name of the appellants to him. In a case of conviction based on circumstantial evidence, the Hon'ble Supreme Court has in a series of cases such as **Subhash Chand versus State of Rajasthan** reported in (2002) 1 SCC 702, **Raja alias Rajinder Versus State**



of Haryana reported in 2015 (11) SCC 43, Kirti Pal Versus State of West Bengal reported in 2015 (11) SCC 178 and Vijay Shankar Versus State of Haryana reported in (2015) 12 SCC 644 categorically held that while convicting the accused based on circumstantial evidence, the court must come to a conclusion that the chain of evidence is complete and there is no reasonable doubt/ground consistent with innocence of the accused. In a recent judgment in the case of Dev Kanya Tiwari v. State of U. P. reported in AIR 2018 SC 1377 the Hon'ble Supreme Court while referring the previous judgment in the case of Govind Nargundkar & Anr. V. State of Madhya Pradesh reported in 1953 Cr. L. Journal 129 discussed as to how the circumstantial evidences would be evaluated. The Hon'ble Supreme Court reiterated that the circumstantial evidences must be fully established. On the face of the evidence available on the record, we find that the chain of circumstantial evidence is not complete in the present case. The witnesses are closely related to each other and because of the previous enmity which they admit, they also seem to be interested in conviction of the appellants. There is no proof beyond doubt that the appellants were actually identified.

14. In the result, we are unable to uphold the judgment of the learned Trial Court. The impugned judgment is hereby set



aside and this appeal is allowed. The appellants are on bail, hence they are discharged from the liabilities of their bail bonds.

(Rajendra Menon, CJ)

(Rajeev Ranjan Prasad, J)

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