

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.921 of 2012

Arising Out of PS. Case No.-96 Year-2007 Thana- PARAIYA District- Gaya

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1. Sureshi Das, son of Late Halkhori Das
2. Dilip Das, son of Sureshi Das
Both are resident of Village-Bagahi, P.S.-Paraiya, District
-Gaya

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Shri Bakshi S.R.P. Sinha, Sr. Advocate
Shri Ashok Kumar Sinha, Advocate
For the Respondent/s : Shri Sujit Kumar Singh, A.P.P.

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 15-01-2018

Two appellants, in the present Appeal, have approached this Court under Section 374(2) and Section 389(1) of the Code of Criminal Procedure, 1973 (hereinafter referred to as “Cr.P.C.”) against judgment of their conviction and sentence. Both the appellants have been convicted on 26.07.2012 for commission of offence under Sections 302/34, 364/120B of the Indian Penal Code, 1860 (hereinafter referred to as the “I.P.C.”) and by sentence dated 04.08.2012 both the appellants were directed to undergo rigorous imprisonment for life under Section 302/ 34 of the I.P.C. and fine of Rs. 2,000/- each. They have further been



directed to undergo rigorous imprisonment for ten years under Section 364/ 120B of the I.P.C. and fine of Rs. 2,000/- each. Both appellants were tried in Sessions Trial No. 166 of 2010 {arising out of Paraiya P.S. Case No. 96 of 2007} and they have been convicted and sentenced by judgment delivered by Sri Krishna Kumar Agrawal, learned Adhoc ADJ- III, Gaya (hereinafter referred to as the “trial judge”).

2. Short fact of the case is that on 08.12.2007 at 9.00 hours (morning) Sub Inspector of Police Sri Rup Narayan Ram / P.W. 9, S.H.O., Paraiya Police Station recorded fardbyan of one Savitri Devi , w/o late Manoj Kumar Chaudhary. The said fardbyan was recorded at the house of late Manoj Kumar Chaudhary of village- Bagahi, Police Station- Paraiya, District- Gaya. In the fardbyan the informant disclosed that in the preceding night i.e. Friday at about 7.30 P.M. her husband Manoj Kumar Chaudhary (deceased), her father –in- law : Shiva Choudhary / P.W. 1 and she herself after taking meal were cleaning their hands. In the meanwhile, her co-villager namely: Nageshwar Das (dealer) , S/o Late Halkhori Das, Sureshi Das (appellant no. 1) S/o Late Halkhori Das and Dilip Das (appellant no. 2) S/o Sureshi Das came near her door and said that party people were calling Manoj Kumar Chaudhary near Middle School. Thereafter, her husband along with them



moved. The informant said that she along with her father –in- law also followed them. When they reached near the Northern road she noticed 1- Baban Das, 2- Motu Chaudhary, 3- Sunil Chaudhary, 4- Munarik Chaudhary , 5- Atyendra Chaudhary, 6- Krishna Chaudhary, 7- Mahendra Chaudhary , 8- Indra Chaudhary, 9- Chhotu Chaudhary , 10- Parvatiya Devi with 10-12 unknown miscreants who were standing carrying rifle and gun. When husband of the informant reached there, the accused persons tied both of the hands of her husband -Manoj Kumar Chaudhary from back side and they carried him to a School of the village which was on the Eastern side of the village. The informant further disclosed that accused persons (miscreants) asked her to call the villagers and when villagers arrived they said that Manoj Chaudhary has committed mistake. The miscreants said that Manoj Chaudhary was spy of the Police and few days back he had given information to the Police, and thereafter, Police force on five vehicles were called and they wanted to apprehend the miscreants. It was further disclosed by the informant that accused (miscreants) had said that Police had conducted raid in the house of Nageshwar Das and said that they will not spare the husband of the informant and compelled the villagers to return back . The informant further stated that she and her father- in- law



tried to persuade the miscreants to leave her husband, however, accused persons holding her husband went to bridge of Eastern Canal and killed him by giving fire arm injury. The informant further said that for the said occurrence Judagir Thakur , S/o late Muneshwar Thakur had prepared the plan and he had played important role of conspiracy in the occurrence. After fardbyan of the informant was recorded, she put her signature, which was also identified by one Anil Chaudhary, who has been examined as P.W. 2. After recording fardbyan, Police drew a formal F.I.R. vide Paraiya P.S. Case No. 96 of 2007 on 08.12.2007 at 17.00 Hours (5.00 P.M.) for offence under Sections 447, 341, 342, 323, 364, 302, 34 of the I.P.C., Section 27 of the Arms Act, 1959 (hereinafter referred to as “Arms Act”) and Section 17 of the Criminal Law (Amendment) Act, 1908 (hereinafter referred to as “Cr.L.A. Act”) . The F.I.R. was lodged against 13 named accused persons and 10-12 unknown miscreants. It is necessary to clarify that both the appellants were named as accused in the F.I.R besides other named accused persons. After the Police prepared inquest report on the dead body of the deceased near the door of the informant herself and after preparing dead body *challan* the dead body was sent for post-mortem examination. The investigating officer during investigation noticed that there were two place of



occurrence, one the *dalan* of the informant where it was said that deceased along with his wife after taking meal was washing their hands, in the meanwhile, accused persons had called him, and thereafter, he was carried, and subsequently, he was done to death and second place of occurrence was noticed as the place where after killing, dead body was lying i.e. near Canal on the outside of the village. The Police during inspection of the second place of occurrence noticed blood- mark on the place of occurrence and he (investigating officer) seized blood soaked soil and a seizure list was prepared. After investigation and finding the case true against some of the accused persons including both the appellants, on 28.2.2008 first charge -sheet was submitted and in the case subsequently, supplementary charge -sheet was also submitted. After submission of charge-sheet, the learned Magistrate took cognizance of offences and subsequently, after complying the provision under Section 207 of the Cr.P.C. i.e. supply of police papers, the case was committed to the court of Sessions, whereafter, on 14th March , 2011 charge under Sections 302/34, 364/ 120B of the I.P.C., Section 27 of the Arms Act and Section 17 of the Cr.L.A. Act was framed against both the appellants and other five accused persons. It is necessary to indicate that relating to the same offence one of the accused namely: Nageshwar Das



was separately tried vide Sessions Trial No. 15 of 2014 / 550 of 2015. During trial to prove its case, the prosecution examined altogether nine witnesses. Out of nine witnesses, the informant namely: Savitri Devi (wife of the deceased) was examined as P.W. 8 , P.W. 1 /father- in- law of the informant and father of the deceased; younger brother of the deceased Anil Kumar Chaudhary was examined as P.W. 2, whereas, P.W. 1 and P.W. 2 were examined as eyewitnesses, whereas, cousin brother of the deceased namely: Sunil Kumar, who was examined as P.W. 3 and sister of the deceased Soni Devi, was examined as P.W. 4 only as hear say witnesses, one another Soni Devi, w/o Arun Chaudhary (younger brother of the deceased) was examined as P.W. 5 and she also claimed to be eye witness. One another person namely: Ganpat Chaudhary (uncle of the deceased) was examined as P.W. 7 and he too claimed to be eye witness to the occurrence. Dr. Arvind Prasad, who conducted post-mortem examination on the dead body of the deceased was examined as P.W. 6 and he proved post-mortem examination report, which was in his writing and signature and marked as Exhibit -2. P.W. 9 /Rup Narayan Ram had recorded fardbyan and had also investigated the case.

3. Sri Bakshi S.R.P. Sinha, learned senior counsel, assisted by Sri Ashok Kumar Sinha, learned counsel for both the appellants



after referring entire evidences i.e. both oral and documentary evidences, has argued that it was a clear cut case of passing judgment of acquittal at least by way of extending benefit of doubt, whereas, the prosecution itself has not proved its case. It has been argued that from the evidence it appears that none had seen the occurrence and only after finding dead body near the Canal outside the village, in a pre-planned manner, most of the villagers, who were in inimical term with the informant's side, were framed as accused besides naming 10-12 unknown miscreants said to be member of a banned organization i.e. M.C.C. He further submits that it is a peculiar case in which wife of the deceased, who was informant in the present case, has not supported the prosecution case and she was declared as hostile witness by the prosecution itself. He further submits that even for the time being if it is assumed that in the fardbyan correct picture was described, as per the fardbyan as well as evidence of P.W. 1/ Shiva Chaudhary no other family member of the deceased had seen as to who had called the deceased from his house. By way of referring to the fardbyan, which has been got exhibited as substituted F.I.R. vide Exhibit- ½, Sri Bakshi S.R.P. Sinha, learned senior counsel for the appellants, has argued that in the fardbyan it was indicated as if both the appellants with Nageshwar



Das had visited the door of the informant and Nageshwar Das had called the deceased, and thereafter, the deceased following three persons had moved to some extent and in the meanwhile, 10-12 unknown miscreants carrying deadly weapons with other named accused tied both hands of the deceased from back side. Thereafter, villagers were called, and subsequently, the deceased was carried by the accused persons towards Canal side, and subsequently, he was done to death by fire arm injury. He submits that in view of the facts disclosed in the F.I.R it was specific case of the prosecution that when deceased was called at that very place in the *dalan*, besides deceased there were only informant and her father –in- law, who has been examined as P.W. 1. He submits that according to this sequence, the presence of P.W. 2 /Anil Kumar Chaudhary, P.W. 5 /Soni Devi and P.W. 7 /Ganpat Chaudhary as eye witness may not be believed. He submits that considering the facts disclosed in the fardbyan as well as evidence of P.W. 1, there is no reason to draw an inference that at the time when deceased was called, either of the aforesaid witnesses i.e. P.W. 2, P.W. 5 and P.W. 7 were present in the *dalan*, and as such, there was no occasion for them to notice as to who had called the deceased and how he was carried by the miscreants. It has been argued that the informant herself has not supported the prosecution



case. This indicates that the facts disclosed in the F.I.R. was introduced by the Police Officer himself. It has also been argued that in the evidence of the Investigating Officer -P.W. 9/ Rup Narayan Ram it has come that on the next date in the morning i.e. on 08.12.2007 at about 6.30 A.M. telephonically the Officer- In-Charge of Paraiya Police Station got an information that one person was killed by unknown miscreants. Thereafter, he recorded station diary entry and Police reached to the house of the informant, where fardbyan was got recorded. According to Sri Bakshi S.R.P. Sinha, learned senior counsel, had anyone seen the participants in the alleged murder on 7.12.2007, which had allegedly taken place at 7-7.30 P.M., certainly rumor of involvement of villagers, particularly the appellants, would have spread in entire locality and while informing the Police, the person who had informed the Police would have certainly said that who were the participants in the murder. Since none had seen any occurrence and only dead body was found near the Canal, subsequently, a case was developed in a village rivalry to implicate the villagers. It has been argued that this is the reason that though number of villagers, who were examined during investigation by the Investigating Officer, had stated that the deceased was killed by miscreants, but villagers were being



falsely implicated, however, the prosecution purposely withhold their evidences and they were neither cited as witness in the charge- sheet nor they were produced to be examined as prosecution witness. At least from those witnesses, two witnesses have come forward to depose as defence witness, who are: D.W. 2 /Jagdeo Mistry and D.W. 7 / Sundar Singh, whose statements were recorded under Section 161 of the Cr.P.C. by the Investigating Officer. Learned senior counsel accepts that before the court below the case was not properly defended and this was reason that though Jagdeo Mistry and Sundar Singh, were examined as D.W. 2 and D.W. 7 respectively, their attention could not be drawn to their previous statement recorded under Section 161 of the Cr.P.C. and this was the reason that this Court allowed Sri Bakshi S.R.P. Sinha , learned senior counsel to refer those paragraphs of the case diary for perusal of the Court, and thereafter, we have also perused the case diary . Of- course , while hearing an Appeal, normally a document which is not on record or exhibited is not required to be examined, but for just decision in the matter, it was thought proper to examine the same, and as such, we have examined the same.

4. Sri Bakshi S.R.P. Sinha, learned senior counsel for the appellants, has further argued that the case of appellants is on



better footing than the case of co- accused Nageshwar Das. He has argued that it was the case of the prosecution that Nageshwar Das, who was accompanied by both the appellants had called the deceased from his house, however, Nageshwar Das was put on trial vide Sessions Trial No. 15 of 2014/ 550 of 2015. He has placed certified copy of the judgment passed in Sessions Trial No. 15 of 2014 / 550 of 2015 in which co -accused Nageshwar Das was separately tried. Let it be kept on record. Sri Bakshi S.R.P. Sinha, by way of referring to the said judgment has argued that while Nageshwar Das was being tried P.W. 1 of the present case i.e. Shiva Chaudhary, father of deceased was examined as P.W. 1 and in the said case he had not supported the prosecution case and he was declared hostile. He submits that said conduct of this witness i.e. P.W. 1 appears to be doubtful, and as such , on such evidence any reliance can not be placed. Accordingly, it has been argued by learned senior counsel for the appellants that judgment of conviction of both the appellants is liable to be set aside.

5. Sri Sujit Kumar Singh, learned Additional Public Prosecutor has opposed the Appeal and supported the judgment of conviction and sentence. It has been argued by Sri Singh , learned Additional Public Prosecutor that evidence of P.W. 1 was sufficient to hold both the appellants guilty. He submits that P.W.



1 /Shiva Chaudhary was the father of the deceased and he has stated that deceased was called by the co- accused Nageshwar Das and with Nageshwar Das both the appellants were also there and both had followed the deceased and thereafter, hands of the deceased was tied by the miscreants, and subsequently, he was killed. He submits that the circumstances suggest that both the appellants were party to conspiracy in committing the offence, and as such , according to Sri Singh, there is no reason to interfere with the judgment of conviction.

6. Besides hearing learned counsel for the parties, we have also perused the materials available on record. Fact remains that the wife of the deceased /Savitri Devi in this case was examined as P.W. 8 and she has not at all supported the prosecution case particularly to the point of involvement of these two appellants. This witness/ informant was examined during the trial as P.W. 8 . Of -course, in her evidence she has proved her signature on the substituted F.I.R., which was marked as Exhibit -1/1, she has categorically stated that the said fardbyan was never read over to her nor it was explained to her . She was only in a position to put her signature, otherwise she was illiterate. In her evidence she has made specific deposition that she had not at all identified both the appellants, but she supported that some unknown



miscreants had killed her husband and has not identified both the appellants . So far evidence of P.W. 2 / Anil Kumar Chaudhary, P.W. 5 / Soni Devi, W/o Arun Chaudhary (younger brother of the deceased) and P.W. 7 / Ganpat Chaudhary (uncle of the deceased) is concerned , on examination of entire evidence, the court may not place reliance on such evidence. It was specific case in the fardbyan as well as evidence of P.W. 1 /Shiva Chaudhary (father of the deceased) that while the three accused including the two appellants had reached their house for calling the deceased, at that very time in *dalan* only informant and her father – in – law i.e. P.W. 8 & P.W. 1 were present. Even P.W. 1 stated that when his son moved along with the two appellants he and his daughter – in – law / P.W. 8 followed his son. Accordingly, on examination of those evidences, there is serious doubt in respect of presence of P.W. 2 , P.W. 5 and P.W. 7 at the time while deceased was called by the appellants and one Nageshwar Das . After the informant Savitri Devi / P.W. 8 was declared hostile, there is only evidence of one person i.e. P.W. 1, and as such, his evidence is required to be examined minutely. In his evidence P.W. 1 has said that on the date of occurrence at 7.30 P.M. he , his son (deceased) and his daughter – in – law / Savitri Devi were at their residence. Nageshwar Das , Sureshi Das (appellant no. 1) and Dilip Das



(appellant no. 2) reached his house and at that very time his son Manoj after taking meal was washing his hand, then Nageshwar Das said that उग्रवादी लोग (miscreants) were calling him. After ten steps from his house near metaled road when Manoj (deceased) reached , all the three aforesaid accused persons tied hands of the deceased from back side . He stated that he along with Savitri Devi / PW. 8 also followed him. In paragraph no. 3 of his evidence he further stated that when his son reached near Middle School, he along with his daughter- in- law also reached there and he noticed number of accused persons there , whom he did not identify. However, this witness subsequently said that he also identified one Judagir. It would be necessary to observe here that in the fardbyan it was disclosed that deceased was called by three accused persons, and thereafter, deceased along with three accused reached to Middle School, and thereafter, miscreants tied both the hands from backside, however, to the reasons best known to this witness , P.W. 1 in his evidence has stated as if both the appellants along with Nageshwar Das after about 10 steps from his house had tied hands of the deceased. It is also evident that in the fardbyan it was alleged that accused Judagir had conspired in commission of offence, however, this witness in his evidence has claimed that he had also noticed Judagir near the



Middle School. Moreover, in the trial of Nageshwar Das this witness had taken a U- turn . Of -course, at the time of hearing of Appeal it was not necessary to place much reliance on the judgment of acquittal in respect of co -accused Nageshwar Das in another trial, but fact remains that in the fardbyan it was alleged that while three accused persons had arrived at the house of the informant , this Nageshwar Das had called the son of P.W. 1 and it was alleged as if both the appellants were accompanying Nageshwar Das, however, during trial of Nageshwar Das, P.W. 1 of the present case, who was also examined in the present trial as P.W. 1, had turned hostile. Accordingly, the evidence in the present case of P.W. 1 appears to be doubtful.

7. So far evidence of P.W. 3 /Sunil Kumar and P.W. 4 /Soni Devi (sister of the deceased) is concerned, they were only examined as hear say witness and since in the present case even evidence of only one eye witness i.e. P.W. 1 has been treated as doubtful, there was no reason for the trial court to hold both the appellants guilty. Moreover, it was not the case of the prosecution that both the appellants besides calling the deceased from his house had participated in any other offence relating to murder of the husband of the informant. In view of the facts and circumstances, we are of the considered opinion that the



prosecution has not proved its case beyond all reasonable doubt, and as such, by way of extending benefit of doubt, they (appellants) are required to be acquitted, and as such, the judgment of conviction dated 26.07.2012 and sentenced dated 04.08.2012 in respect of both the appellants in Sessions Trial No. 166 of 2010 {arising out of Paraiya P.S. Case No. 96 of 2007 } is hereby set aside and the Appeal is allowed. Since both the appellants are in custody and judgment of their conviction and sentence has been set aside, it is hereby directed to release them forthwith, if not wanted in any other case.

(Rakesh Kumar, J)

(Arvind Srivastava, J)

praful/-

AFR/NAFR	AFR
CAV DATE	NA
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