

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No. 498 of 2012

Arising Out of PS. Case No.-35 Year-2006 Thana- Shri Nagar District- Madhepura

Radhe Shyam Malakar, son of Late Ram Prasad Malakar, Resident of Village-
Laxmipur Bhagwati Tola, Jhitkiya, P.S.- Sri Nagar, District- Madhepura.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with
Criminal Appeal (DB) No. 66 of 2013

Arising Out of PS. Case No.-35 Year-2006 Thana- Shri Nagar District- Madhepura

Ramanand Rishideo, son of Kamleshwari Rishideo, Resident of Village
Laxmipur, Bhagbali Tola, Jhitkiya, P.S. Sri Nagar, District Madhepura.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

(In Criminal Appeal (DB) No. 498 of 2012)

(In Criminal Appeal (DB) No. 66 of 2013)

For the Appellant/s : Mr. Shekhar Kumar Singh, Adv.

Mr. Pankaj Kumar Jha, Adv.

For the Respondent/s : Mr. Ajay Mishra, A.P.P.

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE PRAKASH CHANDRA

JAISWAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 08-02-2019

Appellants in both the appeals were tried together and
convicted & sentenced by the common judgment of the trial court
and as such, both the appeals were taken up together under the



heading “For Hearing” and are being disposed of by this common judgment.

2. The appellant Radhe Shyam Malakar {in Cr. Appeal (DB) No. 498 of 2012} by judgment dated 19-04-2012 was convicted for commission of offence under Sections 302/34 & 120(B) of the Indian Penal Code, 1860 (hereinafter referred to as ‘I.P.C.’) and by order dated 26-04-2012, he was sentenced to undergo imprisonment for life and to pay a fine of Rs. 5,000/- (five thousand). In default of payment of fine, he was directed to further undergo rigorous imprisonment for three months. Similarly, by judgment dated 19-04-2012, the appellant Ramanand Rishideo {in Cr. Appeal (DB) No. 66 of 2013} was convicted for commission of offence under Sections 302 & 120(B) of the I.P.C. as well as Section 27 of the Arms Act, 1959 (hereinafter referred to as ‘Arms Act’) and he too was sentenced, vide order of sentence dated 26-04-2012, to undergo imprisonment for life under Sections 302 & 120(B) of the I.P.C. and to pay a fine of Rs. 5,000/- (five thousand). In default of payment of fine, he was directed to further undergo rigorous imprisonment for three months, however under Section 27 of the Arms Act, no separate sentence was imposed. Both the sentences were directed to run concurrently. The judgment of conviction and sentence was passed by the learned



Additional Sessions Judge, Fast Tract Court No. I, Madhepura (hereinafter referred to as 'Trial Judge') in Sessions Trial No. 269 of 2007/Sessions Trial No. 269A of 2007 (arising out of Shri Nagar P.S. Case No. 35 of 2006).

3. Short fact of the case is that on 19-10-2006 at 06:00 AM, the Sub-inspector of Police-cum-officer incharge, Shri Nagar Police Station, Sri Ajay Kumar Singh (P.W.9) recorded *fardbeyan* of Md. Jainul resident of village Laxmipur Bhagwati Tola, Jhitkiya, P.S. - Shri Nagar, District- Madhepura. The said *fardbeyan* was recorded near the door of the informant (Md. Jainul). In the *fardbeyan*, the informant stated that in the preceding night on 18-10-2006, he was going to sleep on verandah and he was laying gunny bag on the floor for sleeping and on the same verandah, on a cot, Md. Saheed (deceased) aged about 20 years, son of Md. Salim (P.W.5) resident of village Chharapatti, P.S. Bhargama, District- Arariya was laying bed-sheet on the cot. The said Saheed (deceased) since last one week was learning stitching in the house of the informant. The wife of informant namely Taroon Khatoon (P.W.7), who had gone outside the house for bringing fuel, after returning told him that she had seen 4-5 miscreants moving from her house to southern passage. In the meanwhile, at about 11:00 in the night, suddenly his neighbour



Radheshyam Malakar {appellant in Cr. Appeal (DB) No. 498 of 2012} by flashing torch came to his house and asked for one kg. of milk. His wife replied that since festival रोजा (*Roja*) was going on, she was not having milk and also exclaimed as to how at 11:00 in the night, one can ask for milk? In the meanwhile, informant's wife told about 4-5 thief/miscreants, who had gone to southern side, on which, Malakar {appellant in Cr. Appeal (DB) No. 498 of 2012} said that if miscreants are there, then on flashing of torch, they may also flash torch. Thereafter, on number of times, he flashed the torch and also shown his hand, on which, from the southern side, miscreants also flashed torch. Subsequently, Malakar {appellant in Cr. Appeal (DB) No. 498 of 2012} taking some plea went to his house. After his departure, immediately at about 11:30 in the night, 4-5 accused persons, who had covered their face, intruded inside the house of the informant and without saying anything or without demanding anything, they started assaulting the informant by *lathi* and *fatta*. After seeing assaulted the informant, Md. Saheed, who was learning tailoring work, with a view to save the informant embraced the informant and started requesting the accused persons to leave the tailor and said whatever they wanted to take, they may take. In the meanwhile, one of the miscreants fired three not. The bullet hit Md. Saheed



and he fell down. The accused persons, after giving gun shot injury, immediately fled away towards northern side. Thereafter, the informant came out from his house and called the name of Malakar {appellant in Cr. Appeal (DB) No. 498 of 2012} and started to raise alarm, however neither Malakar (appellant) nor any other villagers immediately came. After some time, some persons arrived and after seeing the same, they left the place. The informant further stated that in his house, twice or thrice, theft had taken place, however he had never lodged any case. After the incident of theft, one of his co-villager namely Kanjarawala, whose father's name was not known to informant, was a criminal, who was already asking him as well as his wife that if he pays money, no incident will take place in his house. The informant further stated that since he was frightened, on number of occasion, he had given wheat, money, *lungi* etc. to said Kanjarawala. On the date of occurrence also, he (Kanjarawala) had demanded Rs. 100/- (one hundred), but same was not paid to him and thereafter, the said accused, after agitating, had returned back. The informant raised suspicion that Radheshyam Malakar {appellant in Cr. Appeal (DB) No. 498 of 2012} and Kanjarawala both resident of village Laxmipur Bhagwati conspiring with 3-4 unknown accused persons had committed the crime, in which Md. Saheed died and



informant also received injury. The said *fardbeyan* was read over to him and after finding it correct, the informant put his signature, however as a witness to the *fardbeyan*, none had come forward to put signature.

4. On the basis of said *fardbeyan*, on the same date i.e. on 19-10-2006 at 11:15 AM, a formal F.I.R., vide Shri Nagar P.S. Case No. 36 of 2006, was registered under Sections 302, 120 (B), 323/34 of the I.P.C. and Section 27 of the Arms Act against Radheshyam Malakar {appellant in Cr. Appeal (DB) No. 498 of 2012} and Kanjarwala. After investigation and collecting material, on 06-07-2007 chargesheet was submitted against both the appellants. At the time of chargesheet, Radheshyam Malakar {appellant in Cr. Appeal (DB) No. 498 of 2012} was in custody, however appellant Ramanand Rishideo @ Kanjarawala {in Cr. Appeal (DB) No. 66 of 2013} was shown to be absconder. After submission of chargesheet, on 07-07-2007, the learned Chief Judicial Magistrate, Madhepura took cognizance of the offence and on 10-10-2007, the case of Radheshyam Malakar was committed to the court of sessions and it was numbered as Sessions Trial No. 269 of 2007. Subsequently, on 04-12-2007, charge was framed against Radheshyam Malakar {appellant in Cr. Appeal (DB) No. 498 of 2012} under Sections 302/34, 120 (B) of



the I.P.C. and Section 27 of the Arms Act. Thereafter, prosecution started to produce witnesses and before amalgamation of the trial of Radheshyam Malakar with the case of Ramanand Rishideo, total five witnesses had already been examined. After completion of appearance of Ramanand Rishideo {appellant in Cr. Appeal (DB) No. 66 of 2013}, his case was committed to the court of sessions and it was numbered as Sessions Trial No. 269A of 2007 and thereafter, charge against Ramanand Rishideo was framed on 20-03-2010 under Sections 302, 120(B) of the I.P.C. and Section 27 of the Arms Act and thereafter on 20-01-2011, both the trials i.e. trial of Radheshyam Malakar {appellant in Cr. Appeal (DB) No. 498 of 2012}, vide Sessions Trial No. 269 of 2007 and trial of Ramanand Rishideo {appellant in Cr. Appeal (DB) No. 66 of 2013} i.e. Sessions Trial No. 269 A of 2007 was amalgamated and trial of both the appellants proceeded together. It is relevant to be noticed that five witnesses, who had already been examined in Sessions Trial No. 269 of 2007, were never recalled for their examination in the trial of Ramanand Rishideo {appellant in Cr. Appeal (DB) No. 66 of 2013} in Sessions Trial No. 269 A of 2007, even after amalgamation.

5. The prosecution has examined altogether nine witnesses and out of nine witnesses, five witnesses were already



examined in Sessions Trial No. 269 of 2007, in which, three witnesses namely P.W.3 Saryug Rishideo, P.W.4 Jamuni Khatoon and P.W.5 Md. Salim, since had not supported the prosecution case, were declared hostile. So far as P.W.1 Maheshwar Sah and P.W.2 Manoj Malakar are concerned, their evidence has got no significance. Though they were not declared hostile, they have not at all stated anything showing involvement of appellant Ramanand Rishideo {in Cr. Appeal (DB) No. 66 of 2013} and as such, it cannot be a case of prejudice to the appellant/Ramanand Rishideo. Even though, five witnesses were examined prior to amalgamation and after amalgamation, they were not recalled for their cross-examination, however, to establish its case on behalf of the prosecution, altogether nine witnesses were examined. Out of nine witnesses, P.W.7 Taroon Khatoon, who is wife of the informant, and P.W.8 Md. Jainul (informant) have only come forward to support the case, as if, in the case both the appellants were involved. They were treated as material witness, otherwise P.W.6 Dr. Ashok Kumar Gupta had conducted *post-mortem* examination on the dead body of the deceased and P.W.9 Ajay Kumar Singh, who was officer incharge of Shri Nagar Police Station, is investigating officer of the case. In the case, P.W.1 Maheshwar Sah and P.W.2 Manoj Malakar had only identified their signature on



the seizure list without whispering anything regarding involvement of either of the appellants. P.W.3 Saryug Rishideo was declared hostile. It is a peculiar case, in which, mother and father of the deceased, who were examined as P.W.4 and P.W.5 respectively, too have not supported the case and they were declared hostile.

6. After referring to entire evidence, Sri Shekhar Kumar Singh, learned counsel for the appellants in both appeals has argued that prosecution has miserably failed to establish its case beyond all reasonable doubt, rather according to learned counsel for the appellants, the present case is an example of false implication by P.W.8 (informant) in connivance with P.W.7 (informant's wife). By way of referring to entire evidence, it has been argued that one can draw an inference that the informant (P.W.8) was itself instrumental in eliminating the deceased, who was a worker and staying in the house of informant, for the purpose of learning tailoring. He submits that suggestions were given to the informant that his wife P.W.7 was having some relation with the deceased and this was the reason that in odd hour in the night, he (Saheed) was done to death and subsequently, in a pre-planned manner, a story was built-up, as if, two appellants with three unknown accused persons, who have covered their faces, had committed the crime. He submits that if evidence of



P.W.7 Taroon Khatoon (wife of informant) and P.W.8 Md. Jainul (informant) is considered together, this depicts regarding entire two different story. P.W.7 in her evidence has stated, as if, the accused persons at the time of occurrence had assaulted her husband (informant) and due to said assault, he became unconscious and at 3.00 hrs. in the morning, the informant was carried by the police to the police station for providing medicine and after 2 or 3 hours, he regained his consciousness, whereas, P.W.8 Md. Jainul (informant) in his evidence has stated that occurrence had taken place at 11.00 in the night, thereafter at 2.45 AM (in the same night) *Mukhiya* of the village informed the police and thereafter, police arrived in the morning and at 6:00 AM, his *fardbeyan* was recorded. Same fact has been disclosed by the investigating officer i.e. Ajay Kumar Singh. (P.W.9). In his evidence, he (I.O.) has stated that in the night at 2.45 AM, he telephonically received information that one tailor in village Shri Nagar has been murdered, thereafter at 3:30 AM, he proceeded to the place of occurrence and returned village Shri Nagar in the morning at 6:00 AM. Thereafter, he recorded *fardbeyan* of the informant and also prepared inquest report at 6:30 AM in the same morning. According to learned counsel for the appellants, in the



evidence of P.W.7 and P.W.8, there is such glaring contradiction, which demolishes entire prosecution case.

7. It has also been argued by learned counsel for the appellants that it is a peculiar case, in which, though the deceased was done to death by fire-arm injury in the night at 11:00 and it was 'Roja' time, even then, till morning at 3.00 hrs., none of the villagers had come nor anyone had taken any pain to inform the police. This appears to be not probable. Learned counsel for the appellants has also argued that mother and father of the deceased, who are P.W.4 and P.W.5 respectively, too have not supported the prosecution case and this is the reason that they were declared hostile. So far as evidence of P.W.1 and P.W.2 is concerned, he submits that their evidence has got not much relevance for holding the appellants guilty, even then, the learned Trial Judge has incorrectly passed judgment of conviction and sentence, which requires to be set aside.

8. Sri Ajay Mishra, learned Addl. Public Prosecutor, though has opposed the appeals, however he candidly submitted that it would be difficult to defend the prosecution case.

9. Besides hearing learned counsel for the parties, we have minutely examined the evidence on record and after going through the same, we are of the opinion that learned Trial Judge



has incorrectly passed the judgment of conviction & sentence and it requires interference. However, before proceeding, it is necessary to cursorily examine the evidence, particularly the evidence of informant and his wife.

10. The informant's wife Taroon Khatoon was examined as P.W.7. She in her evidence has stated that deceased was labour of her husband and he was in the house. Md. Saheed (deceased) was learning tailoring. She stated almost similar fact, which was stated by the informant in his *fardbeyan*, however; in cross-examination in paragraph – 41 she stated that for whole night, none of the villagers had come. Almost in similar manner, that was stated in the *fardbeyan*, however; in examination-in-chief, she stated, as if, both the appellants with other five unknown persons had actively participated and both the appellants firstly assaulted her husband and thereafter Radhe Shyam Malakar {appellant in Cr. Appeal (DB) No. 498 of 2012} caught hold of the deceased and Ramanand Rishideo {appellant in Cr. Appeal (DB) No. 66 of 2013} gave shot of firing, whereas this was not the case of the prosecution. In the *fardbeyan*, it was very much specific that before the occurrence, even Radheshyam Malakar had returned back after being denied supply of milk and after about half-an-hour, the accused persons arrived, intruded into the house and



occurrence was committed. The informant has also not disclosed the name of Ramanand Rishideo {appellant in Cr. Appeal (DB) No. 66 of 2013} in his *fardbeyan* regarding any active participation by him. In paragraph-43 of her cross-examination, she stated that villagers had come at the time of 'Azan' before the sunrise. In paragraph-46 of her cross-examination, she stated that police was informed by *Mukhiya* and in paragraph-47, she had stated that neither she nor her husband had informed the Mukhiya. Police arrived in the morning at 03:00, whereas, in paragraph-48, she stated that police inquired from her about the occurrence and at that very time, her husband was unconscious. In paragraph-49, she stated that her husband had become unconscious after being assaulted by the accused persons. In paragraph-50 of her cross-examination, she stated that her husband was carried by the police to the police station for providing medicine and then, he regained consciousness. In paragraph-61 of her cross-examination, she stated that house of the deceased Saheed was about one kilometer away in the village Bhargama, District- Araria. It is pertinent to notice that the wife of the informant i.e. Taroon Khatoon has specifically stated that in the occurrence, her husband was assaulted by the accused persons and thereafter, in the same occurrence, he became completely unconscious. Police arrived at



03:00 in the morning on the same date and thereafter, her husband was carried to the police station, where he was treated and he regained his consciousness. However; as per evidence of the informant (P.W.8) as well as evidence of investigating officer (P.W.9), it is case of the prosecution that *fardbeyan* of the informant was recorded near the door of the informant himself in the village Shri Nagar in the morning at 06:00 AM. The evidence of P.W.7 completely demolishes the prosecution case. On the basis of such fact, the Court may consider some force in the suggestion given by the defence during the trial to the informant that the deceased was having some relation with the wife of the informant (P.W.7). Ofcourse, such suggestion has got no evidentiary value, but for creating doubt in the mind of the Court, those facts are sufficient.

11. Similarly, the informant P.W.8 Md. Jainul, though had proved his signature on the *fardbeyan*, which was marked as Ext.3, contrary to the fact disclosed in the *fardbeyan*, has come out with a new case that at the time of occurrence, Radheshyam Malakar {appellant in Cr.Appeal (DB) No. 498 of 2012} had caught hold of the informant and thereafter, Ramanand Rishideo {appellant in Cr.Appeal (DB) No. 66 of 2013} had given shot of firing.



12. It is also peculiar that P.W.7 and P.W.8 both have stated that Radheshyam Malakar had come to their house at 11:00 in the night for the purposes of taking one kg. of milk. This also appears to be not probable. Besides this, both the witnesses have said that other unknown accused persons had covered their faces at the time of crime. It is case of the prosecution that both the appellants were co-villager of the informant and there was pre-acquaintance in between the informant side and appellants side. There was no reason for appellants to come to the house of the informant for committing crime without covering their faces, whereas other unknown accused persons had covered their faces. This also creates serious doubt in the mind of the Court. The investigating officer is specific on the point that he, in paragraph-20 of his cross-examination, has stated that on 19-10-2006 in the morning at 02:45, Mukhiya had given a telephonic call in the police station, thereafter within 45 minutes i.e. at 03:30 hrs. in the morning, he proceeded from the police station to the place of occurrence and in paragraph-22, he stated that he reached the place of occurrence at 06:00 in the morning.

13. Dr. Ashok Kumar Gupta, P.W.6 on 19-10-2006 was posted as Medical Officer, Sadar Hospital, Madhepura and he conducted *post-mortem* examination on the dead body of the



deceased. He had noticed only one gun shot injury. Ofcourse, two wounds were found on the person of the deceased i.e. one was entry wound and another was exit wound, which was caused by fire-arm. P.W.6 has proved the *post-mortem* report, which was marked as Ext.2.

14. The evidence of P.W.1 Maheshwar Sah and P.W.2 Manoj Malakar have got no relevance for adjudicating the present case. They have only said regarding identification of signature on the so-called seizure list, whereas, P.W.3 Saryug Rishideo, who was examined before amalgamation of both trials, had turned hostile.

15. In the case, a peculiar fact has been noticed by this Court that though P.W.7 in her evidence had accepted that the village of the deceased was only one kilometer away and occurrence had taken place in the night at 11:00, even then, till commencement of the *post-mortem* on the dead body, it appears that parents of the deceased were never informed. The parents of the deceased i.e. mother and father have been examined as P.W.4 Jamuni Khatoon and P.W.5 Md. Salim, they have not at all supported the prosecution case and both the witnesses were declared hostile by the prosecution.



16. The investigating officer Sri Ajay Kumar Singh, on 18-10-2006 was posted as officer incharge, Shri Nagar Police Station and he, in his evidence, has stated that at about 02:45 hrs. (in the night), on the date of occurrence, he got telephonic information regarding the murder of tailor master in the village Shri Nagar. Thereafter, in his evidence, it has come that he along with other force proceeded to the place of occurrence at 03:30 hrs. in the morning on the same date and thereafter, he reached the place of occurrence in the morning at 06:00 and recorded *fardbeyan* of the informant. The *fardbeyan* has been marked as Ext.3/1. He proved endorsement on the *fardbeyan* and same was marked as Ext.3/2, and formal F.I.R. as Ext.4. He also prepared inquest report, which was marked as Ext.5. The investigating officer had noticed one pillet at the place of occurrence, regarding which, seizure list was prepared and also requisition regarding the so-called injury on the person of the informant, which was marked as Ext.6.

17. On examination of the evidence of investigating officer as well as evidence of P.W.8 (informant) Md. Jainul and his wife P.W.7 Taroon Khatoon, it is evident that there are serious inconsistencies regarding recording of the *fardbeyan* itself. Once P.W.7 in specific term had stated that in the occurrence, her



husband was assaulted and he became unconscious and in the same night at about 03:00 hrs., he was carried to the police station and after 2 or 3 hours, he regained consciousness, recording of *fardbeyan* at the door of the informant in the morning at 06:00 AM, may not be considered as truthful or credible. Besides this, there are several inconsistency in the evidence. Even the Ext.6, which is requisition and injury report of the informant, shows that the injuries on the person of the informant were simple in nature and mostly bruises.

18. Learned counsel for the appellants had argued that it appears that the investigating officer had connived with the informant and thereafter, such report was prepared to show, as if, informant was assaulted at the time of occurrence.

19. However, after examination of entire evidence, we are of the considered opinion that the prosecution has miserably failed to establish its case and as such, it is a fit case for interference with the judgment of conviction and sentence.

20. Accordingly, the judgment of conviction dated 19-04-2012 and order of sentence dated 26-04-2012 passed in Sessions Trial No. 269 of 2007/Sessions Trial No. 269A of 2007 (arising out of Shrinagar P.S. Case No. 35 of 2006) by Sri Manoj Shankar, learned Additional Sessions Judge, Fast Track Court



No.I, Madhepura is, hereby, set aside and both the appellants are acquitted from all the charges.

21. Appellant Ramanand Rishideo {in Cr. Appeal (DB) No. 66 of 2013} is in custody and since the judgment of conviction and sentence has been set aside, he is directed to be released forthwith, if not wanted in any other case. The appellant Radhe Shyam Malakar {in Cr. Appeal (DB) No. 498 of 2012} is already on bail and as such, he is discharged from the liability of his bail-bond.

22. Both the appeals are allowed.

(Rakesh Kumar, J.)

(Prakash Chandra Jaiswal, J.)

Anay

AFR/NAFR	AFR
CAV DATE	NA
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