

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No. 836 of 2013

Arising Out of PS. Case No.-144 Year-1995 Thana- Ujiyarpur District- Samastipur

1. Md. Hasmatullah @ Md. Hasmat @ Munnu @ Munna, son of Late Md. Ataul Haque, resident of Village - Karihara, Police Station - Sarairanjan, District - Samastipur
2. Sahdeo Das, son of Late Sukhlal Das, resident of Village - Shiv Nagar, Police Station - Ujiyarpur, District - Samastipur

... .. Appellants

Versus

The State of Bihar

... .. Respondent

with

Criminal Appeal (DB) No. 791 of 2013

Arising Out of PS. Case No.-144 Year-1995 Thana- Ujiyarpur District- Samastipur

Md. Rahmat, son of Late Md. Ataul Haque, resident of Village- Karihara, Police Station- Sarairanjan, District- Samastipur.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

(In Criminal Appeal (DB) No. 836 of 2013)

with

(In Criminal Appeal (DB) No. 791 of 2013)

For the Appellant(s) : Mr. Krishna Prasad Singh (Sr. Adv.)
Mr. Manindra Kishore Singh (Adv.)

For the State : Mr. Ajay Mishra (A.P.P.)

For the Informant : Mr. Manish Kumar No. 13, Advocate
Mr. Rohit Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE PRAKASH CHANDRA

JAISWAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 25-02-2019



Appellants in aforesaid two appeals were tried together and convicted & sentenced by a common judgment and as such, aforesaid both appeals were taken-up together under the heading “For Hearing” and are being disposed of by this common judgment.

2. All the appellants by judgment dated 19-07-2013 were held guilty and convicted for commission of offence under Sections 436/34 and 302/34 of the Indian Penal Code, 1860 (hereinafter referred to as ‘I.P.C.’). By order dated 27-07-2013, all the appellants were sentenced under Section 436/34 of the I.P.C. to undergo rigorous imprisonment for 10 (ten) years and to pay a fine of Rs. 5,000/- (five thousand) each. Under Section 302/34 of the I.P.C., all the appellants by the same order i.e. order dated 27-07-2013 were sentenced to undergo imprisonment for life and to pay a fine of Rs. 5,000/- (five thousand) each. In default of payment of fine, they were directed to further undergo rigorous imprisonment for one year. All the sentences were directed to run concurrently. The appellants were tried in Sessions Trial No. 382 of 1997 (arising out of Ujiyarpur P.S. Case No. 144 of 1995) and convicted and sentenced by judgment passed by Sri Panchanan Sharma, learned 1st Additional District & Sessions Judge, Samastipur (hereinafter referred to as the ‘Trial Judge’). Though,



along with appellants, one more accused namely Md. Irfan was tried, however by the same judgment, the co-accused Md. Irfan, by way of extending benefit of doubt, was acquitted of all the charges.

3. Short fact of the case is that on 10-10-1995, a written report was submitted under the signature of Chulhai Mahto (P.W.1). The written report was addressed to the officer incharge, Ujiyarpur Police Station, Samastipur. In the written report, it was disclosed that on 10-10-1995, in the night at 10.00 hrs., (1) Ataul Haque (Amin) son of Nemul Haque, (2) Md. Munnu son of Md. Irfan (*however in the chargesheet as well as in memo of appeal father's name is Md. Ataul Haque*), (3) Md. Rahmat son of Ataul Haque, (4) Sahdeo Das son of Sukhlal Das, all resident of village Shivrinar attacked on his dwelling house and set his house on fire. Along with those accused persons, there were other accused persons also. All the accused persons were carrying *lathi*, *bhala* and other weapons. After seeing Md. Ataul igniting the house, his son Indrajeet Mahto (P.W.3) raised alarm, thereafter the informant and other family members started running out from the house, however his younger daughter, while she was being taken out of the house by his wife, one ignited portion of the hut fell on her child and due to same, she received serious burn injury. The informant stated in his written report to take appropriate action



against aforesaid anti-social elements. On the written report, Chulhai Mahto (P.W.1) put his L.T.I. (Left Thumb Impression). As witness to the written report, (i) Lal Muhammad put his L.T.I, who was examined as P.W.4 and (ii) Jay Narayan Sharma put his signature, who was examined as P.W.5.

4. On the basis of said written report, on the same date i.e. on 11-10-1995 at 13:00 hrs (i.e. 01:00 PM), a formal F.I.R., vide Ujiyarpur P.S. Case No. 144 of 1995, was registered for commission of offence under Sections 147, 148, 149, 323, 307, 436 of the I.P.C. and Section 3 (x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the 'SC/ST Act'). Subsequently, after death of the daughter of the informant, Section 302 of the I.P.C. was added. The F.I.R. was lodged against following four named accused persons and one another unknown accused:-

1. Ataul Haque (since died),
2. Md. Munnu {app.1 in Cr.App.(DB) No. 836/13},
3. Md. Rahmat (sole app. in Cr.App.(DB) No. 791/13}&
4. Sahdeo Das {app.2 in Cr. App.(DB) No. 836/13}.

5. During investigation, accusation against all the F.I.R. named accused persons was found true and as such, on 24-11-1996 chargesheet was submitted against four F.I.R. named accused persons and one another namely Md. Irfan. After



submission of chargesheet, on 21-01-1997, the learned Sub-Divisional Judicial Magistrate, Dalsingsarai (Samastipur) took cognizance of the offence. Thereafter, on 29-09-1997, the case was committed to the court of sessions and it was numbered as Sessions Trial No. 382 of 1997. On 11-10-1999, charge was jointly framed against five accused persons including the appellants and Md. Irfan under Section 436, 452, 302/34 of the I.P.C. and Section 3 (1) (x) of the SC/ST Act. The appellants denied the charge and claimed to be tried.

6. During the trial, to establish its case on behalf of the prosecution, altogether 10 witnesses were examined. Out of 10 witnesses, Chulhai Mahto (informant) was examined as P.W.1, Sunaina Devi (wife of informant) was examined as P.W.2 and Indrajeet Mahto (son of informant) was examined as P.W.3. The aforesaid three witnesses had claimed to be eye-witness to the occurrence, whereas Jay Narayan Sharma, who put his signature as a witness to the F.I.R., was examined as P.W.5 and he also claimed to identify accused persons while fleeing away, except accused Sahdeo Das {appellant no. 2 in Cr. Appeal (DB) No. 836 of 2013}. Similarly, P.W.6 Deo Narayan Sharma is another co-villager, who claimed to identify accused persons, except appellant Sahdeo Das {in Cr. Appeal (DB) No. 836 of 2013},



while fleeing away after the occurrence. P.W.9 Smt. Shobha Sinha had examined the injured daughter of the informant, who was aged about 1½ months and she proved the injury report, which was marked as Ext.3. Dr. Arun Kumar Jha (P.W.8) conducted *post-mortem* examination on the dead body of the deceased and proved the *post-mortem* report, which was marked as Ext.2. P.W.10 Dinanath Pandey, Sub-Inspector of Police, Ujiyarpur Police Station had recorded re-statement of the informant and inspected the place of occurrence, whereas P.W.7 Daya Nath Jha is the third investigating officer, who only submitted chargesheet in the case and arrested accused persons. P.W.4 Lal Muhammad, who stood as witness to the written report/F.I.R., since did not support the case, was declared hostile.

7. It is clarified that after framing of charge, during the trial, one of the accused namely Ataul Haque died and as such, his case stood abated and dropped on 27-08-2007 and the case proceeded against remaining four accused persons, which includes all the three appellants.

8. After examination of the prosecution evidence, regarding incriminating circumstances and evidences, the accused persons were questioned and their statement under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as



‘Cr.P.C.’) was recorded, in which, they claimed to be innocent. Ofcourse, from the defence side, no witness was examined, only one document was got exhibited, which was marked as Ext.1. Learned Trial Judge by the impugned judgment, while acquitting one of the accused namely Md. Irfan, convicted and sentenced aforesaid three appellants by the impugned judgment, which has been assailed by the appellants in the aforesaid two appeals.

9. Sri Krishna Prasad Singh, learned senior counsel for the appellants, after placing entire evidence, has argued that the prosecution has not been able to establish its case beyond all reasonable doubt. He submits that the prosecution case comes into cloud of doubt, due to the reason that though P.W.1 (informant) and his wife (P.W.2) were not eye-witnesses to the occurrence, during the trial, they pretended, as if, entire occurrence was seen by them and they identified all the appellants while committing the crime and also while fleeing away. In respect of evidence of P.W.5 and P.W.6, it has been argued that those witnesses were interested witnesses, since P.W.5 and P.W.6 had purchased a land from the sister of Ataul Haque (accused who died during the trial) without having any right and title for transferring the land like informant of the present case. He submits that informant of the present case by committing fraud had taken land from the sister of



Ataul Haque (one of the accused, who died during trial). Since the appellants side were asking them to vacate the land by way of removing the hut, which was built by the informant, the informant himself has fabricated the case or implicated the appellants.

10. According to Sri Singh, learned senior counsel for the appellants, the written report appears to be not believable and is doubtful, since it was case of prosecution that the said written report was written by P.W.5 Jay Narayan Sharma, however during evidence, said Jay Narayan Sharma (P.W.5) has denied regarding his writing on the written report. Meaning thereby that written report was not under the writing of P.W.5 and as such, the written report may be considered as doubtful. Sri Singh has further argued that in absence of examination of the police officer, who registered F.I.R. on the basis of written report, as well as non-examination of the main investigating officer, who had examined most of the prosecution witnesses during investigation, the case of defence has seriously been prejudiced. According to Sri Singh, prosecution has not given any plausible explanation for their non-examination and as such, the judgment of conviction and sentence is liable to be interfered with.

11. Alternatively, it has been argued by learned senior counsel that from the entire evidence, it is evident that appellants



were having no intention to kill anyone, at best, it could be a case that the appellants, with a view to remove unauthorized structure by the informants side, had put the hut into fire. Accordingly, the learned Trial Judge has incorrectly passed the judgment of conviction under Section 302/34 of the I.P.C. According to Sri Singh, in absence of establishing a case of intention to kill or murder, in such situation, the appellants would have been held guilty for commission of offence under Section 304 Part II of the I.P.C. He submits that appellant no. 1 in Cr. Appeal (DB) No. 836 of 2013 (Md. Hasmuatullah) has already remained in custody for six years and as such, while altering the conviction from Section 302/34 of the I.P.C to Section 304 Part II of the I.P.C., the sentence may be modified to the extent of period already undergone.

12. Sri Ajay Mishra, learned Addl. Public Prosecutor as well as Sri Manish Kumar No. 13, learned counsel for the informant have vehemently opposed the appeal(s). It has been argued that the case is based mainly on the evidence of P.W.3, who at the time of occurrence, was aged about 9 years. Before the occurrence, P.W.3 had come out from the hut for the purpose of urinating, in the meanwhile, he saw all the F.I.R. named accused persons, who had assembled near the hut. P.W.3 was threatened by



aforesaid accused persons and thereafter from the eastern side, the accused persons ignited the hut of the informant. Accordingly, the evidence of P.W.3 is very much specific showing involvement of all the appellants. It has also been argued that evidence of P.W.3 has been corroborated by evidence of P.W.5 and P.W.6, who are co-villagers, and have deposed that after occurrence, they had seen the appellants fleeing away. Ofcourse, it has not been disputed that P.W.5 and P.W.6 have not claimed to identify the appellant no. 2 Sahdeo Das {in Cr. Appeal (DB) No. 836 of 2013} at the time of fleeing away after the occurrence. It has been argued by learned Addl. Public Prosecutor as well as learned counsel for the informant that after the occurrence, P.W.1 and P.W.2 hurriedly came out from the hut. Thereafter, three children could be saved by way of taking out from the hut, however while P.W.3 was trying to get her younger baby child aged about 1½ months out of hut, one piece of wood fell on her, which burnt the daughter of P.W.1, who subsequently died due to burn injury. The injured was firstly examined by P.W.9 and considering the seriousness of the burn injury, she was referred to Sadar Hospital, Samastipur, where the injured subsequently died. P.W.9 has proved the injury report, which was marked as Ext.3. The death by burn injury was substantiated by Ext.3 as well as as per the evidence of P.W.8 Dr.



Arun Kumar Jha, who conducted *post-mortem* examination on the dead body. The death of daughter of the informant has occurred due to burn injury. Accordingly, it has been argued that the learned Trial Judge has rightly passed the judgment of conviction and sentence, which requires no interference.

13. Besides hearing, we have minutely examined entire evidence on record and after going through the same, we are satisfied that the learned Trial Judge has rightly passed the judgment of conviction under Section 436/34 of the I.P.C. However before proceeding further, it would be necessary to examine the evidence on record, particularly the evidence of P.W.3 Indrajeet Mahto, who on the date of evidence was aged about 14 years. His evidence was recorded on 03-05-2000, however in the case, occurrence had taken place in the year 1995. Meaning thereby that on the date of occurrence, this witness was aged about 9 years. In his evidence, he stated that for urinating, he had come out from his hut, then he saw about ten accused persons. Amongst them, he could identify five accused persons, who were Munnu Babu {appellant no. 1 in Cr. Appeal (DB) No. 836 of 2013}, Rahmat Babu {sole appellant in Cr. Appeal (DB) No. 791 of 2013}, Irfan Babu (accused, who was acquitted by the trial court), Subodh Das (neither sent up for trial nor named in the



F.I.R.), Sahdeo Das {appellant no. 2 in Cr. Appeal (DB) No. 836 of 2013} and Ataul Babu (died during the trial). In paragraph-2 of his evidence, he stated that those accused persons ignited the hut and when he tried to raise *hulla*, he was threatened. On his *hulla*, his mother came out. In paragraph-4 of his evidence, he stated that after the hut was set on fire, his mother brought out his sisters and other brothers from the hut and on last occasion, while his mother was taking out his baby sister, a piece of flamed hut fell down, in which, baby was burnt. He further stated that in the hut, there were articles for amount of Rs. 50,000/- (fifty thousand), all were burnt. In paragraph-7 of his cross-examination, P.W.3 stated that since last one year, the said place of occurrence was his dwelling house. Earlier, the said house was toddy shop, but in the same, they were residing. In paragraph-9 of his cross-examination, he stated that within half an hour, the entire hut was burnt into ashes. His attention was drawn to his previous statement to the extent that he had not said regarding identification of Irfan (acquitted by the trial court itself).

14. P.W.1 Chulhai Mahto and P.W.2 Sunaina Devi are father and mother respectively of P.W.3. They too have claimed to witness entire occurrence, however in view of evidence of P.W.3,



it is difficult to place reliance on their evidence regarding witnessing entire occurrence.

15. P.W.5 Jay Narayan Sharma and P.W.6 Deo Narayan Sharma are co-villagers. P.W.5, in his evidence, has claimed to identify accused persons while fleeing away. He could identify only Ataul (died during trial), Rahmat (appellant in Cr.App.DB No. 791/13), Irfan (acquitted by the trial court) and Munnu (appellant-1 in Cr.App.DB No. 836/13) after the occurrence, while they were fleeing away. However, this witness, on being shown the written report, stated that it was not in his writing, but he identified his signature on the written report, which was marked as Ext.1. The written report was only marked for identification as Ext.'x'. Similarly, P.W.6 Deo Narayan Sharma (another co-villager) in his evidence has claimed to identify the accused persons while fleeing away, however, he had not claimed to see appellant no. 2 Sahdeo Das {in Cr. Appeal (DB) No. 836 of 2013} at the time, while other accused persons were fleeing away.

16. P.W.9 Smt. Shobha Sinha on 11-10-1995 was posted as Medical Officer in Primary Health Centre, Ujiyarpur and she examined the baby (daughter of P.W.1 Chulhai Mahto) and noticed following injuries:-

“1. Burn injury on the left side of temporal parital of the forehead region and left cheek, left ear about 6” x 4” x skin deep.



2. Burn injury 1" x 1" x skin deep on back of arm;
3. Burn injury on the lateral side of elbow joint and arm and hand about 2.5" x 1" x skin deep.
4. Burn injury about 3" x 2.5" x skin deep on the left side of abdomen.
5. A burn injury on the knee joint about 1.5" x 1" x skin deep.
6. A oblique blabe 1/2" x 1/3" on the lateral side of thigh.
7. A burn injury about 2" x 2" x skin deep on left side of back."

This witness has proved the injury report, which was marked as Ext.3.

17. P.W.8 Dr. Arun Kumar Jha on 13-10-1995 was posted as Medical Officer, Sadar Hospital, Samastipur and on the same date, he conducted *post-mortem* on the dead body of Baby Kumari, aged about 1½ months, daughter of Chulhai Mahto (P.W.1) and he noticed following facts:-

"The condition of the subject was of average built; Rigor Mortis present in all the four limbs.

The following ante-mortem burn injuries were found on the person of deceased -

The burn constituted about 40% comprising of burn over left half of scalp and face. The left half of anterior thorasic wall and upper left half of Anterior abdominal wall, left front of knee and lower of thigh, left hand, adjacent arm and fore arm, blisters nearby full of serous adjacent and lining of hair of eye lashes were present and line of redness around the burnt area. The injuries were caused by burn by fire.

Time elapsed since death- within 24 hours.

Weopon – Burn due to fire.

Opinion – Death has been caused due to shock and asphyxia due to above-mentioned burn injuries."



This witness has stated that the *post-mortem* report was in his writing and signature and same was marked as Ext.2.

18. On examination of evidence of P.W.8 (Dr. Arun Kumar Jha) and P.W.9 (Shobha Sinha), it is evident that the minor daughter of the informant Baby Kumari, aged about 1½ months, died due to burn injury.

19. P.W.10 Dina Nath Pandey on 11-10-1995 was posted as Sub-Inspector of Police, Ujiyarpur Police Station and he was handed over investigation on the same dated i.e. 11-10-1995 by the officer incharge of the police station, who had recorded the statement during investigation. He inspected the place of occurrence, regarding which, he had detailed the fact in paragraph – 2 of his evidence. He noticed that the hut was in burned condition and he also noticed one cot, which was kept inside the hut, and same was in burned condition and other articles were burnt to ashes. Same fact was reiterated in paragraph – 3 of his evidence and he had seized the ashes as well as burnt wood, however; during the trial, neither seizure list was got exhibited nor burnt articles were produced. Subsequently, on 12-10-1995, he handed over the investigation to one Sri Indradeo Prasad, Sub-Inspector of Police, who has not been examined in the case.



20. P.W.7 Daya Nath Jha (3rd investigating officer) was another Sub-Inspector of Police, who on 20-04-1996 was officer incharge of Ujiyarpur Police Station, had taken investigation from Sub-Inspector of Police Indradeo Prasad and thereafter, he arrested the accused and submitted chargesheet. Meaning thereby that this officer has not conducted any actual investigation in the case, but the actual investigation, which was done by S.I. Indradeo Prasad, has not been examined.

21. The evidence of P.W.3 (Indrajeet Mahto) regarding identification of Md. Hasmatullah @ Md. Hasmat @ Munnu @ Munna {appellant no. 1 in Cr.Appeal (DB) No. 836 of 2013} and Md. Rahmat {sole appellant in Cr.Appeal (DB) No. 791 of 2013} has been corroborated by the evidence of P.W.5 & P.W.6, who had seen them immediately after the occurrence while fleeing away, however; identification of Sahdeo Das {appellant no. 2 in Cr.Appeal (DB) No. 836 of 2013} has not been corroborated by other witnesses and therefore, it would not be safe to approve the judgment of conviction and sentence in respect of Sahdeo Das {appellant no. 2 in Cr.Appeal (DB) No. 836 of 2013} and as such, by way of extending benefit of doubt, the appeal, in respect of Sahdeo Das {appellant no. 2 in Cr.Appeal (DB) No. 836 of 2013}, is allowed and his conviction and sentence dated 19-07-2013 and



27-07-2013 respectively passed in Sessions Trial No. 382 of 1997 (arising out of Ujiyarpur P.S. Case No. 144 of 1995) by the learned 1st Additional District & Sessions Judge, Samastipur is hereby set aside.

22. However, on going through the evidence of prosecution witnesses, we are of the opinion that the learned Trial Judge has not committed any error in convicting the remaining appellants for commission of offence under Section 436/34 of the I.P.C.

23. So far as Section 302/34 of the I.P.C. is concerned, on examination of entire evidence, we have not found any material to suggest that the remaining appellants were having any intention to kill or murder any of the inmates of the hut, rather in the evidence of prosecution witnesses, it appears that they were trying to dispossess the informant from the land in question, since they were claiming that without any authority, the informant had got the said land transferred from the sister of one of the accused Ataul Haque, who died during trial. Accordingly, in absence of any material suggesting intention to kill, we are of the opinion that the learned Trial Judge was not correct in passing the judgment of conviction under Section 302/34 of the I.P.C. However, fact remains that once the remaining appellants, after knowing the fact that the premises i.e. hut was a dwelling house and in odd time in the night, set ablaze the hut, there is every possibility that they



were knowing well that such of their act was enough to cause death. However, after going through the entire evidence, nothing has come forward to suggest that remaining appellants were having any intention to kill anyone. It appears that they wanted to remove the hut from the land in question and as such, they, instead of being convicted under Section 302/34 of the I.P.C., were liable to be convicted under Section 304 Part II r/w Section 34 of the I.P.C. Accordingly, in view of evidence on record, the conviction of remaining appellants in respect of Section 302/34 of the I.P.C. can be altered to Section 304 Part II r/w Section 34 of the I.P.C.

24. So far as conviction of remaining appellants is concerned, which has been modified, and since in the case, occurrence had taken place long back in the year 1995, we are of the opinion that if the sentence of life imprisonment is reduced to the period of 10 years, same will serve the purpose.

25. Accordingly, the remaining appellants i.e. Md. Hasmutullah @ Md. Hasmat @ Munnu @ Munna {appellant no. 1 in Cr.Appeal (DB) No. 836 of 2013} and Md. Rahmat {sole appellant in Cr.Appeal (DB) No. 791 of 2013} whose conviction has been altered from Section 302/34 I.P.C. to Section 304 Part II r/w Section 34 of the I.P.C. are sentenced to undergo rigorous imprisonment for ten (10) years and to pay a fine of Rs. 5,000/-



(five thousand) each. The judgment of conviction and sentence dated 19-07-2013 and 27-07-2013 respectively of aforesaid two appellants under Section 436/34 of the I.P.C. passed by learned 1st Additional District & Sessions Judge, Samastipur in Sessions Trial No. 382 of 1997 (arising out of Ujiyarpur P.S. Case No. 144 of 1995) is approved and conviction of aforesaid two appellants under Section 302/34 of the I.P.C. is altered with Section 304 Part II r/w Section 34 of the I.P.C. and sentence is modified, as indicated above. All the sentences are directed to run concurrently.

26. Accordingly, the appeal of the appellant no. 1 Md. Hasmutullah @ Md. Hasmat @ Munnu @ Munna i.e. Cr. Appeal (DB) No. 836 of 2013 and appeal of sole appellant i.e. Md. Rahmat i.e. Cr. Appeal (DB) No. 791 of 2013 are dismissed with modification, as indicated above.

27. Since the appeal in respect of appellant no. 2 Sahdeo Das i.e. Cr. Appeal (DB) No. 836 of 2013 has been allowed and the judgment of conviction and sentence has been set aside, he is discharged from the liability of his bail-bond.

28. The sole appellant in Cr. Appeal (DB) No. 791 of 2013 i.e. Md. Rahmat, in view of rejection of appeal, is directed to



surrender before the court below forthwith, failing which, the learned court below may take all steps for securing his attendance for serving the sentence.

(Rakesh Kumar, J.)

(Prakash Chandra Jaiswal, J.)

Anay

AFR/NAFR	AFR
CAV DATE	NA
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