

israil and ors. Vs. State of Bihar

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Court : Patna

Decided On : Jul-17-2002

Judge : M.L. Visa and B.K. Jha, JJ.

Appeal No. : Criminal Appeal (DB) No. 433 of 1987

Appellant : israil and ors.

Respondent : State of Bihar

Disposition : Appeal Allowed

Judgement :

M.L. Visa, J.

1. This appeal is directed against the judgment and order dated 26.5.1987 passed by 7th Additional Sessions Judge, Purnea, in Sessions Trial No. 215/84 convicting and sentencing the appellants to undergo imprisonment for life under Section 396 of the Indian Penal Code (in short, IPC).

2. The case of prosecution as disclosed in the written report (Ext. 2) of informant Ayub Hassan (PW-10) is that in the night of 1.3.1982 informant was at his 'Darwaja' when at about mid night some persons came to his 'Darwaja' and tied his father Tamizuddin and set him on fire. The informant identified all the appellants and Aminuddin and Sadique amongst those persons who were armed with weapons

and were saying that they would kill his father. They also after breaking the door of the house of informant entered the house and assaulted the informant with 'lathi' but the informant anyhow managed to escape from there. The appellants and their companions entered the room of Md. Yakub (PW-7), brother of informant, who at that time was sleeping in the room and assaulted him also. On 'hulla' villagers namely, Tahir Hussain (PW-4). Majebul (not examined), Khasebul (not examined), Samiruddin (not examined) and Khalibur Rahman (PW-9) and others came to the house of informant to whom the informant told about the occurrence. The appellants and their companions while leaving the place of occurrence took away the wrist watches of the informant and his brother and they also took away articles of the house of informant. About the genesis of occurrence informant in his written report has stated that there was previous enmity between him and appellants who had given threatening to him, his father and his brother. The female members of the house of informant extinguished the fire but father of informant had received burn injuries and he was brought to Bahadurganj Hospital. On the basis of written report of informant a case under Sections 438 and 380 IPC was registered against the appellants along with Aminuddin and Sadique. Later on, father of informant succumbed to burn injuries and FIR was amended under Section 396 IPC. After investigation police submitted charge-sheet against the appellants and co-accused Aminuddin and Sadique showing co-accused Aminuddin and Sadique as well as appellant Israil as absconders. Other two persons namely, Sheikh Latif and Sheikh Sohrab who were arrested during the investigation of the case were shown as not sent up. Later on, appellant Israil and co-accused Sadique were arrested and remanded in this case and thereafter separating the case of co-accused Amuniddin the case of all the three appellants and co-accused Sadique was committed to the Court of Session. Charges under Sections 396 and 302/34 IPC were framed against all the three appellants and co-accused Sadique who was granted bail during the pendency of the trial but jumped the bail and he was declared absconder and trial against all the three appellants proceeded who after trial were found guilty under Section 396 IPC and were accordingly convicted and sentenced to undergo imprisonment for life as indicated above. The case of appellants as it appears from the trend of cross-examination under Section 313 of the Code of Criminal Procedure is that the informant runs a shop and on account

of purchase of some articles by appellants some dispute had arisen and on account of that dispute they have been falsely implicated in this case.

3. In order to prove its case the prosecution has examined 11 witnesses. Ayub Hassan (PW-10) is the informant. Dr. S.C. Choudhary (PW-11) is the doctor who at the time of occurrence was posted as Incharge of Bahadurganj Hospital where the deceased was taken with burn injuries and who after examining the deceased had intimated the matter to the Officer-in-charge of Bahadurganj Police Station and recommended for transfer of injured to Sub-Divisional Hospital, Kisanganj. He also examined the informant and has proved the post-mortem examination report of deceased which is said to be in the pen and signature of Dr. M.Z.S. Qureshi. Md. Salim (PW-1), Md. Afeal (PW-2) and Md. Hasnain (PW-5) are the witnesses who after receiving the news that deceased had been admitted in the Hospital had gone to Bahadurganj Hospital and thereafter also to Kisanganj Hospital where the deceased is said to have told them names of appellants amongst the persons who participated in the occurrence. Sami Mohammad (PW-3) is a witness on the inquest report prepared in his presence by police on which he and Tahir Hussain put their signatures. Tahir Hussain (PW-4) and Khalilur Rahman (PW-9) are tendered witnesses. Sabir Alam (PW-6), Md. Yakub Hussain (PW-7) and Md. Tajibuddin (PW-8) are the witnesses who were in the house of informant at the time of occurrence.

4. Dr. S.C. Choudhary (PW-11) in his evidence has said that on 2.3.1982 he was posted as Incharge at State Dispensary Bahadurganj and on that day the deceased Tazimuddin was brought before him with bum injuries and he then intimated this matter to Officer-in-charge of Bahadurganj Police Station and recommended for transfer of deceased, who at that time was injured, to Sub-divisional Hospital, Kisanganj. He has proved his report which is marked Ext. 4. He has further said that on the same day he examined the informant and found a, bruise over his left thigh which was of the size of 1' 1'. He has proved the injury-report (Ext. 5) prepared for the injury of informant. He has further said that one Yakub was referred to him by officer-in-charge of Bahadurganj Police Station and he examined him on 16.3.1982 and found looseness of the right inciser and canine on the upper jaw. He has proved the injury report (Ext. 5/1) for Yakub (PW-7). He

has also proved the post-mortem examination report in respect of deceased which, according to him, is in the pen and signature of Dr. M.Z.S. Qureshi who, according to him, was posted as Deputy Superintendent, Sub-divisional Hospital, Kisanganj and thereafter transferred to Singhbhum or Dhanbad. This report is marked Ext. 6. In cross-examination he has admitted that post-mortem examination was not written in his presence and he is not conversant with the details of post-mortem examination and he cannot say whether deceased Tazimuddin was conscious or unconscious when he was brought before him and he cannot say for what period deceased remained in State Dispensary.

5. Md. Ayub Hassan (PW-10), informant and son of deceased, in his evidence has said that on the night between 1.3.1982 and 2.3.1982 a dacoity was committed in his house and in that dacoity the dacoits set fire to his father and at that time his father was aged about 70 years. He has further said that his father at the time of occurrence was sleeping alone in the 'Baithaka' and he himself along with his wife and children was sleeping in a room inside the house and his brother Md. Yakub (PW-7) was sleeping in a room situated towards west of courtyard of the house and he awoke when the dacoits were breaking the door of his house and after breaking the door about 8 dacoits entered his room and at that time a lantern was burning in the room and dacoits were armed with lathi, torch and two guns. He has added that dacoits after flashing the torch were looking for the articles and they assaulted him with lathi and tied his hands but he inspite of his hands being tied came out of his house and the dacoits had demanded money from him and he then gave them a sum of Rs. 1200 which he had kept on his bed. He had further said that amongst dacoits he identified the appellants along with Aminuddin and Sadique and when dacoits left the place of occurrence he entered his house and he had raised 'hulla' in the village on which villagers assembled to whom he told the names of appellants and other two persons who were identified by him at the time of dacoity and when he came at the courtyard of his house he found his father lying unconscious with burn injuries. According to him, the dacoits had taken away articles after breaking the boxes of his house and they had also taken away the articles of Yakub. In the morning he took his father to Bahadurganj Hospital and thereafter he went to police station where he first verbally told about the occurrence but then officer-in-charge of police station told him to give a written

report on his dictation and thereafter he submitted written report (Ext. 2). In para 11 of his evidence he has said that written report submitted by him is not correct because whatever the officer-in-charge of police station told him he wrote in his written report. In para 12 he has made it more clear by saying that the portion of written report where it is stated that he identified five persons including the appellants amongst the persons who set fire to his father and fire was extinguished by the female members of his family is not correct while remaining portion is correct. According to his evidence the fire was extinguished by villagers. He has further said that subsequently he had submitted a list of articles which were taken away by the dacoits in the dacoity. This list is marked Ext. 3. In cross-examination he has admitted that about 8-10 years prior to dacoity he was knowing all the three appellants and in para 21 of this evidence he has said that he had a 'Kirana' shop at Kathalbari hat from 1964 to 1978 but in the year 1978 he closed that shop and the appellants used to visit Kathalbari hat and occasionally used to purchase articles from his shop. He has denied the suggestion of defence that on the point of purchase of articles on credit by appellants from his shop a dispute between him and the appellants had arisen.

6. Md. Salim (PW-1), Md. Afzal (PW-2) and Md. Hasnain (PW-5) in their evidence have said that they received information that deceased was admitted in Bahadurganj State Dispensary and on that information they went there and found the deceased lying unconscious there with burn injuries and thereafter deceased was taken to Kisanganj Hospital where also they went along with the deceased and in Kisanganj Hospital after some time deceased regained consciousness and told them that appellants Kalimuddin and Bangru had caught hold of him and appellant Israil wrapped his body with jute and thereafter co-accused Aminuddin pouring kerosene oil on his body set fire causing him burn injuries. They have further said that at Kisanganj Hospital the doctor advised to take the deceased to Siliguri and when the deceased was being taken to Siliguri he died in the way. They all have said that they do not identify any of the appellants. Out of these witnesses PW-1 and PW-5 are grandsons and PW-2 is son-in-law of deceased.

7. Sabir Alam (PW-6), Md. Yakub Hussain (PW-7) and Md. Tazibuddin (PW-8), as stated earlier, are witnesses who are said to be present at the time of occurrence

in the house of informant. Sabir Alam (PW-6) has said that at the time of occurrence he along with deceased, Tazibuddin (PW-8) and Zakir Hussain (not examined) was sleeping in the 'Baithka' of the house of informant and in the night somebody hit him with lathi and he awoke and other persons also awoke and he saw that four persons carrying bombs had entered the house and at that time there was no lantern or any other source of light and those persons who had entered the house caught hold of deceased and took him in the courtyard and he and other persons were closed in the room of 'Baithka' and when villagers opened the door the dacoits fled away and informant told them that amongst dacoits he identified appellants along with Aminuddin and Sadique. He has said that dacoits had committed 'loot-pat' but he could not identify any of the dacoits. In para 5 of his evidence he has said that he does not recognise any person names of whose the informant had told him. In para 7 of his cross-examination he has clearly said that because of darkness he could not identify any dacoit. Md. Yakub Hussain (PW-7), brother of informant, in his evidence has said that at the time of occurrence he was sleeping in his house which consists of two rooms and he awoke on hearing the sound of knocking of the door and when he opened the door, 4-5 dacoits flashing torches entered his room. According to him, at that time there was no light in the room and because dacoits were flashing torches on his eyes, therefore, he could not identify any dacoit and dacoits after breaking open the boxes kept in the room took away the articles and dacoits confined him in his room by closing the door of his room from outside. He then through staircase which is in his room went to the roof of the house and after jumping from there he ran towards village and raised 'hulla' and again returned to his house when dacoits had fled away. He found his father with burn injuries who was being carried to 'Baithka' and his father was crying with pain. He has also said that informant told him that amongst the dacoits he identified the appellants along with Aminuddin and Sadique. About his father he has said that his father was not naming any miscreant because he was in pain and after some time he became unconscious. He has also not identified the appellants in Court. Md. Tazibuddin (PW-8) has said that he is a neighbour of deceased and at the time of occurrence he was sleeping in the outer house of deceased along with deceased, Sabir Alain (PW-6) and Zakir (nor examined) and at that time there was no light and it was dark and he awoke

when somebody hit him and he found 5-6 persons in his house and many persons going in the courtyard of house but he could not identify any one of them. He has further said that the miscreants took the deceased outside after confining him and others inside the house and when the dacoits left the place of occurrence somebody opened the door and thereafter when he went in the courtyard he found burn injuries on the deceased who at that time was unconscious and was saying something. He has also said that informant told him that amongst dacoits he had identified the appellants along with Aminuddin and Sadique. In his cross-examination he has said that on the night of occurrence there was heavy rain and complete darkness and nothing was visible and for this reason he could not count the numbers of miscreant entering the house and he only felt that some persons had entered the house.

8. Neither the I.O. nor the doctor who held post-mortem examination on the dead body of deceased has been examined. Barring the evidence of PW-11 there appears two sets of witnesses. First set consists of PWs. 1, 2 and 5 who have simply stated that at Kisanganj Hospital the informant regained consciousness for some time on 3.3.1982 and he then told them the names of appellants and Aminuddin Ali these witnesses have reproduced the statement of deceased in verbatim according to which appellants Kalimuddin and Bangru caught hold of deceased and appellant Israil wrapped his body with jute and co-accused Amiriuddin poured kerosene oil and set fire. They all have failed to identify the appellants. PW-2 has further said that neither he knows parentage of appellants nor their residences. They all have further said that when they first reached Bahadurganj State Dispensary, on the news that deceased had been admitted there, they found him lying unconscious with burn injuries and doctor attending there advised for taking the deceased to Kisanganj and thereafter the deceased was brought to Kisanganj Hospital where he was admitted and where he regained consciousness for some time and disclosed them the names of appellants. PW-1 has said that at Kisanganj Hospital, he along with deceased and other witnesses reached at about 8-9 p.m. In para-3 he has said that deceased regained consciousness at Kisanganj Hospital at about 9 O'clock in the morning. Occurrence is said to have taken place on the night between 1.3.1982 and 2.3.1982. So from the evidence of PW-1 it appears that deceased regained

consciousness on 3.3.1982 at about 9 a.m. when he disclosed the names of appellants. PW-2 also in para 4 of his evidence has said that on the next day for 20-25 minutes the deceased regained consciousness. His earlier statement that he had gone to Bahadurganj Hospital on 2.3.1982 on receiving information that deceased had been admitted there shows that deceased regained consciousness on 3.3.2002. In para 8 he has said that deceased regained consciousness at about 9 O'clock in the morning. PW-5 has also said that deceased regained consciousness on 3.3.1982 when he disclosed names of appellants. PW-1 in para 8 of his evidence has said that when deceased regained consciousness the doctor and other staff of the Hospital were not there. In para-9 he admits that neither he nor anybody else informed the doctor through any staff of Hospital that the deceased had regained consciousness. PW-2 has also said that when deceased regained consciousness he informed a nurse that deceased had regained consciousness and had talked with him but he did not tell her to call the doctor. PW-5 has said that when deceased regained consciousness he went to the chambers of doctor to inform him that the deceased had regained consciousness and at that time the doctor was talking with somebody else and he came only after the deceased again became unconscious. The case of informant and other witnesses who are said to be present in the house of informant at the time of occurrence is that deceased became unconscious immediately after the occurrence and he was brought in the State of unconsciousness to Bahadurganj Hospital. The evidence of PWs. 1, 2 and 5 who are said to have gone to Kisanganj Hospital along with deceased is that at the time of admission in Kisanganj Hospital the deceased was unconscious. So from the evidence of prosecution witnesses it appears that after the occurrence deceased became unconscious and he remained so till his death except for some time at Kisanganj Hospital where he is said to have regained consciousness and in that State he disclosed the name of appellants to PWs. 1, 2 and 5 who had gone to Bahadurganj State Dispensary on hearing the news of occurrence and are admittedly not the eye-witnesses to the occurrence. It is very surprising that at the time of naming the appellants by deceased at Kisanganj Hospital neither the informant nor Md. Yakub Hussain (PW-7), brother of informant, or any other member of the house of informant who at the time of occurrence was in the house was present there. Neither the

informant nor his brother in his evidence has said that deceased had regained consciousness at any time at Kisanganj Hospital and had disclosed the names of appellants to PWs. 1, 2 and 5. Besides this, as stated earlier, to PW-1, 2 and 5 the deceased is said to have only told names of appellants without giving their parentage or any other detail about their village or profession etc. PWs. 1, 2 and 5 have clearly said that they do not know the appellants and they failed to identify them in Court. Their evidence that deceased regained consciousness for some time at Kisanganj Hospital when he disclosed names of appellants to them does not appear trustworthy in view of evidence of PWs. 7, 8 and informant that immediately after the occurrence deceased was crying with pain and some time thereafter he became unconscious. Md. Tazimuddin (PW-8) has said that after the occurrence deceased was conscious and he was saying something but it is very surprising that at that time he did not disclose names of appellants. If the evidence of PWs. 6, 8 and 10 that deceased after the occurrence was in much pain and agony is believed and be considered as reason for not disclosing the name of appellants at that time even then the evidence of PWs. 1, 2 and 5 that deceased regained consciousness for some time at Kisanganj Hospital and disclosed them certain names which are names of the appellants will not conclusively prove that deceased meant the appellants in absence of any further details of those names.

9. The evidence of second set of witnesses which includes PWs. 6, 8 and 10 shows that only informant identified the appellants and two others at the time of occurrence and he told their names to PWs. 6 and 8. The case of informant is that he told the names of appellants and other two persons who were identified by him amongst the dacoits to villagers but not a single such villager has been examined. In para 33 of his evidence the informant has said that he was not knowing the name of father of co-accused Sadique and he after making inquiry from Chaukidar had given the name of father of Sadique in his written report. In para 34 of his evidence he has made it further clear by saying that he met the Chaukidar the day of dacoity itself and the Chaukidar saying that Sadique was a criminal had disclosed his parentage. His further evidence that he submitted written report at the dictation of officer-in-charge of Bahadurganj Police Station and whatever he was told by him he wrote in his written report and some portion of his written report such as about the enmity with appellants, he is any eye-witness to that part of

occurrence in which his father was set on fire, and fire was extinguished by female members of his house is not correct makes his evidence quite doubtful that he had identified the appellants amongst the dacoits. About the articles which are said to have been taken away by the dacoits and list of which was submitted by him later on we find that in the fardbeyan the informant alleged that dacoits at the time of dacoity had snatched his wrist watch as well as the wrist watch of his brother and about the articles we find that the words 'other articles' have been added subsequently in the fardbeyan. Neither the informant nor his brother in his evidence has alleged the allegation of snatching his wrist watch by dacoits. Besides this, other witnesses who were, as alleged, present at the time of occurrence have stated that there was no source of light in the house and on the day of occurrence there was heavy rain and complete darkness. In view of this evidence the evidence of informant that he identified the appellants at the time of occurrence does not inspire confidence and because this is the only evidence against the appellants we find that their conviction and sentence on the basis of solitary evidence of informant which for the reasons stated above does not appear trustworthy cannot sustain. We, therefore, find that the prosecution has not been able to prove its case against the appellants beyond all reasonable doubts.

10. In the result, this appeal is allowed. The judgment and order of the Court below convicting and sentencing the appellants is set aside. The appellants are ordered to released forthwith if not wanted in any other case.

B.K. Jha, J.

I agree.

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