

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.772 of 2016

Arising Out of PS. Case No.-15 Year-1992 Thana- Valmikinagar District- West Champaran

Fagu Mushahar Son of Hathu @ Chhathu Mushahaf, R/o village- Sohariya,
P.S.-Valmiki Nagar and District- West Champaran.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with
CRIMINAL APPEAL (DB) No. 791 of 2016

Arising Out of PS. Case No.-15 Year-1992 Thana- VALMIKINAGAR District- West
Champaran

Govind Mahto Son of Fenku @ Fenku Mahto, R/o village- Sohairyra, P.S.-
Valmiki Nagar, District- West Champaran

... .. Appellant

Versus

The State of Bihar

.. ... Respondent

Appearance

(In CRIMINAL APPEAL (DB) No. 772 of 2016)

For the Appellant Mr. Bashishtha Narayan Mishra, Advocate

Mr. Brij Kishor Mishra, Advocate

For the Respondent Mr. Dilip Kumar Sinha, APP

(In CRIMINAL APPEAL (DB) No. 791 of 2016)

For the Appellant Mr. Bashishtha Narayan Mishra, Advocate

Mr. Brij Kishor Mishra, Advocate

For the Respondent Mr. Dilip Kumar Sinha, APP

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

and

HONOURABLE MR. JUSTICE PARTHA SARTHY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH)

Date: 11-05-2022

With consent of the parties, these two appeals have
been taken up for final hearing.

2. In these two appeals, the appellants have
challenged the judgment of conviction and order of sentence
dated 07.06.2016 and 09.06.2016 respectively passed by the



learned 3rd Additional Sessions Judge, Bagaha (West Champaran) in Sessions Trial No.162 of 1996 arising out of Valmikinagar P.S. Case No.15 of 1992 whereby and whereunder they have been convicted and sentenced to undergo rigorous imprisonment for life and a fine of Rs.10000/- each for the offence punishable under Section 302 of the Indian Penal Code (for short 'IPC') and in case of non-payment of fine to further undergo rigorous imprisonment for a term of one year each, rigorous imprisonment for ten years and a fine of Rs.5000/- each for the offence punishable under Section 364 of the IPC and in case of non-payment of fine to further undergo simple imprisonment for six months each and rigorous imprisonment for 7 years and a fine of Rs.3000/- each for the offence punishable under Section 201 of the IPC and in case of non-payment of fine to undergo a further period of imprisonment for three months each. However, no separate sentence has been passed for the offence under Section 120-B of the IPC.

3. The prosecution case is based on the oral statement of one Bhutahi Devi, recorded by Mr. B. K. Pandey, a Sub-Inspector of Police of Valmikinagar Police Station on 08.06.1992 at 7 a.m. in which she alleged that on 07.06.1992, in the night, while she was sleeping in the inner room of her house



and her husband, a *chowkidar*, was sleeping in the outer room of the house, at about 3 a.m., some persons came and asked her husband Bhimal Mushahar to open the door. She also woke up. Her husband opened the door. She went to the room of her husband where she found one man armed with gun and another armed with *lathi*. They asked her husband to come out of the room. Her husband came out of the room and she also followed him. Outside the room, three persons were found standing. Out of them, two were holding *lathi*. When the informant requested them to allow her husband to return to his house, the miscreants threatened to kill her. They took her husband towards east. While they were taking him towards east, she heard one of the miscreants saying that this time he would not be spared. He would be killed and his body would be thrown. She stated that one of the miscreants was concealing his face by *gamachcha*. She described the physique of other miscreants and stated that they were speaking in *Bhojpuri* and if an opportunity is given to her, she would identify them as she had seen their face in moon light.

4. On the basis of the aforesaid oral statement of Bhutahi Devi, Valmikinagar P.S. Case No.15 of 1992 was registered on 08.06.1992 under Section 364 of the IPC against



five unknown persons and investigation was taken up.

5. On completion of investigation, the Investigating Officer submitted charge-sheet under Section 173(2) of the Code of Criminal Procedure in the court of Additional Chief Judicial Magistrate against eight accused persons, namely, Balkishun Mahto, Chandrika Mahto, Ravindra Mahto, Ganga Mahto, Nandlal Mahto, Mangal Mushahar, Fagu Mushahar and Govind Mahto for committing the offences punishable under Sections 364, 302, 201 and 120B of the IPC.

6. At the time of filing of the charge-sheet Balkishun Mahto, Chandrika Mahto, Ravindra Mahto, Ganga Mahto and Nandlal Mahto were in custody whereas the other three accused persons were absconding.

7. After commitment of the case to the court of sessions for trial, the trial of absconding accused persons were split up and the trial against those who were in custody got concluded.

8. Subsequently, Fagu Mushahar and Govind Mahto were apprehended and were put on trial for hearing committed the offences under Sections 364, 302, 201 and 120B of the IPC.

9. During trial, altogether six witnesses were examined on behalf of the prosecution in support of its case.



They are P.W.1 Bhutani Devi (wife of the deceased), P.W.2 Timal Mushahar (brother of the deceased), P.W.3 Moti Mushahar (brother of the deceased), P.W.4 Vishwanath Mushahar, P.W.5 Doctor Mahto and P.W.6 Man Bahali Mushahar.

10. On completion of evidence adduced on behalf of the prosecution, statements of the accused-appellants were recorded under Section 313 of the Code of Criminal Procedure (for short 'CrPC'). In their statement under Section 313 CrPC, they have denied the allegations and claimed themselves to be innocent.

11. The defence did not lead any evidence in support of its case.

12. After the closure of the prosecution and the defence case, arguments were heard and the respective appellants in these two appeals have been held guilty for the offences punishable under Sections 364, 302, 201 and 120B of the IPC vide impugned judgment dated 07.06.2016 and as a consequence of their conviction, they were sentenced by the trial court vide impugned order dated 09.06.2016.

13. Out of six witnesses examined on behalf of the prosecution, **P.W.4** Vishwanath Mushahar, **P.W.5** Doctor Mahto



and **P.W.6** Man Bahali Mushahar did not support the prosecution case. They were declared hostile by the court at the instance of the prosecution. **P.W. 3** Moti Mushahar did not turn up after his examination-in-chief and cross-examination in part. Hence, his evidence was discarded by the Trial Court.

14. Thus, the entire case of the prosecution rests on the evidence of **P.W.1** Bhutahi Devi and **P.W.2** Timal Mushahar for arriving at the finding of guilt against the appellants. The Trial Court has also placed its reliance on the statement of the accused Ravindra Mahto recorded under Section 164 of the CrPC which has been marked as Exhibit-1.

15. The statement of co-accused Ravindra Mahto was recorded by a Judicial Magistrate under Section 164 Cr.P.C. on 08.07.1992. He stated before the Judicial Magistrate that Mangal Mushahar forced him to accompany the group of criminals in which Fagu Mushahar, Ramkishun Dhangar, Mangal and one relative of Mangal were present. They met Balkishun and asked him the address of chowkidar. Thereafter, they went to the house of Bhimal Mushahar. They forcibly abducted Bhimal Mushahar. The wife of Bhimal Mushahar was crying for the release of her husband but they did not leave him. They brought Bhimal Mushahar to Tirhut canal. They killed him



by pressing his neck by *lathi* and *danda* and threw his dead body in the canal and went towards the *jangal*.

16. In her testimony, **P.W.1** Bhutahi Devi reiterated the facts stated by her in her oral statement on the basis of which the FIR was instituted. She identified the accused appellants in the dock. She stated that they were the persons who had caught hold of her husband and took him outside the house. In cross-examination, she admitted that she had stated before the police that she could not identify any accused by face. Immediately after saying so, she controverted herself by saying that she had stated before the police that she could identify the miscreants if she gets an opportunity to see their face. She admitted that the Investigating Officer had not held Test Identification Parade. She admitted that in her previous statement made before the police, she had stated that unknown miscreants had abducted her husband Bhimal Mushahar. When her attention was drawn towards her previous statement made before the police, she denied to have stated that when Ganga Mahto was going to sell stolen wood, her husband had got him arrested. She stated that she does not remember that she had stated before the police that Balkishun Mahto, Chandrika Mahto and Nandlal Mahto had threatened her husband to forego his claim in respect of a plot



failing which he would be killed. She denied to have stated before the police that on a disputed plot admeasuring 18 dhurs, her house and the house of Sukai Mahto had been constructed and when her husband got rent receipt in respect of the said plot, the accused persons had threatened him to abandon his claim over the plot in dispute. She admitted that accused appellants, who are residents of a village situated at a distance of two kilometer from her village had no animosity with her husband from before. She also admitted that her niece had got married in the village of accused-appellants. She denied the defence suggestion that she has falsely deposed before the Court and no such occurrence as alleged by her had ever taken place.

17. **P.W. 2** Timal Mushahar stated in his testimony that the deceased Bhimal Mushahar was his brother. At the time of the occurrence, he was sleeping at his door. He woke up hearing voice of some persons and saw that two miscreants had caught hold of his brother and they were taking him outside the house and his sister-in-law (Bhutahi Devi) was following them. When his brother requested them to let him go, they refused to release him. They stated that they would kill him. He stated that in all there were five accused persons. Out of them, one was holding a gun and others were holding *lathi*. He could identify the



accused-appellants amongst the miscreants. One of the miscreants Balkishun had put cloth over his face. However, he could identify him too. His brother Bhimal did not return till date. He stated that his brother had dispute relating to 18 dhur of homestead land with Balkishun. The rent receipt for the land was being issued in the name of his brother. Balkishun had forcibly captured the land and when his brother Bhimal requested him to vacate his illegal possession over the land, he used to threaten him to kill. He identified the accused appellants in dock.

18. In cross-examination, he admitted that the police had taken his statement one day after the occurrence. He had stated before the police that unknown accused persons had abducted his brother. He admitted that he knew accused-appellants from before by their name. He further admitted that he identified them at the time of occurrence itself. He stated that his niece is married in the village of the accused-appellants. Since he used to go to her house quite often, he came to know the name of the accused-appellants. He denied the defence suggestion that he had not disclosed the name of the accused-appellants to the police. He admitted that accused-appellants have no concern over the disputed homestead land which was



captured by the accused Balkishun. He admitted that the name of the husband of his niece is Paras. However, he denied any knowledge about ongoing dispute between the accused-appellants and the husband of his niece. He further denied to have participated in a panchayati which was held for resolution of the dispute between the accused-appellants and the husband of his niece. He also denied to have given the name of the accused-appellants in the case at the instance of Paras. When his attention was drawn towards his previous statement, he said that he had not stated before the police that unknown miscreants had caught hold of his brother and took him away.

19. Mr. Bashishtha Narayan Mishra, learned counsel for the appellants submitted that the Trial Court has not appreciated the facts and law involved in the case in the proper perspective. The trial court failed to appreciate that the informant did not disclose the name of the accused-appellants at the time of lodging the first information report. It also failed to appreciate that P.W.2 is the full brother of the deceased. In case, he had identified the accused appellants at the time of commission of the crime, he would have certainly disclosed it to the informant and the police at the first instance. It did not appreciate the fact that the Investigating Officer of the case was



not examined during trial. In absence of examination of the Investigating Officer, the contradictions from P.W.1 and P.W.2 could not be taken in spite of the fact that their attention was drawn towards the previous statement made before the police. He submitted that non-examination of the Investigating Officer has prejudiced the case of the defence to a great extent.

20. Mr. Mishra further contended that in the instant case, since the accused persons were not named in the FIR, they ought to have been put on Test Identification Parade after their arrest. In absence of the Test Identification Parade, the dock identification of the accused-appellants after several years of the commission of the offence could not be made basis for their conviction. He contended that it is surprising as to how the Trial Court took into consideration the statement of one Ravindra Mahto recorded under Section 164 of the CrPC as a substantive piece of evidence. According to him, a confessional statement recorded under Section 164 of the Code of Criminal Procedure may be used to corroborate or contradict the statement made in the court in the manner provided under Sections 157 and 145 of Indian Evidence Act by cross-examining the person concerned during trial.

21. *Per contra*, Mr. Dilip Kumar Sinha, learned



Additional Public Prosecutor for the State submitted that P.W.1 and P.W.2 are the eye witnesses to the occurrence. They have fully supported the prosecution case as narrated in the FIR. There is no inconsistency in their evidence. The evidence of P.W.1, who is the wife of the informant is trustworthy. The corroborative evidence of P.W.2, who is the brother of the deceased is also relevant. There is no reason to disbelieve their evidence. The accused-appellants were identified in the dock. According to him, identification in dock, is a substantive piece of evidence. He stated that the accused-appellants cannot take the plea of not putting them on Test Identification Parade as they themselves were responsible for it. They had absconded during investigation and the charge-sheet was submitted by the Investigating Officer showing them as absconder. He stated that it is a gross case in which the accused persons abducted the husband of the informant Bhutahi Devi and killed him and dispersed his body which was never recovered. The deceased was last seen with the accused-appellants and other miscreants. He contended that the statement of the accused Ravindra Mahto recorded by a Judicial Magistrate under Section 164 of the CrPC was a public document under Section 74 of the Indian Evidence Act. Hence, it was admissible under Section 80 of the Indian



Evidence Act. It did not require any formal proof and there was no necessity to summon the Magistrate who had recorded the same.

22. We have heard learned counsel for the parties and carefully perused the records.

23. It has been argued on behalf of the appellants that in the absence of the Test Identification Parade of the accused-appellants after several years of the commission of the offence could not be made basis for the conviction. While refuting the contention advanced on behalf of the appellants, learned counsel for the State submitted that since the appellants were absconding during investigation, they cannot take this plea before the court.

24. We find substance in the submission of the learned counsel for the State in this regard.

25. On perusal of the lower court records, it would be evident that in the instant case, the Charge-sheet No. 26 of 1992 dated 30.09.1992 was submitted in the court of Jurisdictional Magistrate after completion of investigation showing the appellants as absconders. The appellant Fagu Mushahar was arrested on 25.05.2003 whereas the appellant Govind Mahto surrendered before the Trial Court on 27.05.2003. Thus, they



appeared before the court after more than ten years of the completion of the investigation. Under such circumstance, it is not open to the appellants to raise objection in respect of not putting them on Test Identification Parade during investigation.

26. Another aspect which would be relevant for consideration in the present case is the statement of Ravindra Mahto recorded under Section 164 of the Cr.P.C. Mr. Mishra, learned counsel for the appellants submitted that the statement of Ravindra Mahto recorded under Section 164 Cr.P.C. cannot be treated as a substantive piece of evidence whereas Mr. Sinha, learned counsel for the State submitted that the statement of co-accused Ravindra Mahto recorded by a Judicial Magistrate under Section 164 Cr.P.C. was a public document under Section 74 of the Indian Evidence Act. Hence, it was admissible under Section 80 of the Indian Evidence Act.

27. The law in this regard is well settled. It is true that the statement of a witness recorded under Section 164 of the Cr.P.C. is a public document under Section 7 of the Indian Evidence Act. Further, Section 80 of the Indian Evidence Act provides that whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a



judicial proceeding or before any officer authorized by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

28. However, it is well settled that the statement recorded under Section 164 of the Cr.P.C. is not a substantive piece of evidence. Such a statement can be used either for corroboration of the testimony of a witness under Section 157 of the Indian Evidence Act or for contradiction thereof under Section 145 of the Indian Evidence Act. Section 145 of the Indian Evidence Act applies to the cases where the same person makes two contradictory statements either in different proceedings or at two different stages of a proceeding. Confession can be used against the maker of it. However, the confession of one accused is not evidence as against the co-accused.

29. In the instant case, the appellants have not made



any confession before Judicial Magistrate. Hence, the confession made by a co-accused whose trial was separately held could not have been used in any manner by the Trial Court for arriving at a conclusion of guilt against the accused-appellants.

30. It would be manifest from the evidence that the victim Bhimal Mushahar was kidnapped from his house on 08.06.1992 at 3:00 a.m. At that time, P.W. 1 Bhutahi Devi and P.W. 2 Timal Mushahar claim themselves to be present in the house and witnessed the incident of Kidnapping. After the incident of kidnapping, Mr. B.K. Pandey, a Sub-Inspector of Police of Valmikinagar Police Station reached at the place of occurrence in the morning on 08.06.1992 and recorded the oral statement of P.W. 1 Bhutahi Devi at 7:00 AM.

31. Thus, P.W. 1 Bhutahi Devi and P.W. 2 Timal Mushahar had sufficient time to interact with each other between 3:00 AM to 7:00 AM. It is P.W. 2 Timal Mushahar, who has admitted in cross-examination that he knew the accused-appellants from before by their name. He admitted that he identified them at the time of occurrence itself. He has also explained as to how he came to know the appellants. He stated that his niece got married to a boy in the village of the accused-



appellants where he used to go frequently. Under such circumstance, not disclosing the name of the accused-appellants by the informant in her oral statement creates serious doubt about the identification of the accused-appellants at the time of commission of the offence. Furthermore, both P.W. 1 Bhutahi Devi and P.W. 2 Timal Mushahar have admitted in cross-examination that in their statement made before the police, they had stated that unknown accused persons had abducted the victim.

32. It is surprising that when the witnesses were knowing the name of the accused persons, then why did they tell the police that unknown accused persons had abducted the victim. P.W. 1 Bhutahi Devi and P.W. 2 Timal Mushahar do not appear to be trustworthy witness. We are of the opinion that the Trial Court has erroneously treated them as trustworthy witnesses.

33. Apart from the testimony or the witnesses being not credible, we find that the Investigating Officer has not been examined during trial. The attention of the witnesses was drawn towards their previous statements. However, in absence of the examination of the Investigating Officer, the contradiction could not be taken from P.Ws. 1 and 2. The non-examination of the



Investigating Officer has certainly caused prejudice to the appellants.

34. Thus, on appreciation of the evidence, we are of the opinion that there are serious infirmities in the prosecution evidence. Hence, the judgment of conviction and the consequent order of sentence passed by the Trial Court cannot be sustained.

35. Accordingly, the appeals are allowed. The impugned judgment of conviction dated 07.06.2016 and the consequent order of sentence dated 09.06.2016 passed by the learned 3rd Additional Sessions Judge, Bagaha (West Champaran) in Sessions Trial No. 162 of 1996 arising out of Valmikinagar P.S. Case No. 15 of 1992 are set aside.

36. The appellants Fagu Mushahar (Cr. Appeal (DB) No. 772 of 2016 and Govind Mahto (Cr. Appeal (DB) No. 791 of 2016) are acquitted of the charges levelled against them. They are directed to be set at liberty forthwith unless their detention is required in any other case.

(Ashwani Kumar Singh, J)

(Partha Sarthy, J)

rohit/-

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