

Patna High Court

Bali Choudhary & Ors vs State Of Bihar on 17 December, 2008

Author: Smt. Mridula Mishra

CRIMINAL APPEAL No.722 OF 2002

Against the Judgment and order dated 11th September,2002, passed by Sessions Judge, Jehanabad in S.T.No.39/93 5/90.

1.SUBEDAR RAM son of Sri Ramdeo Ram

2. Bijendra Yadav son of Sri Janak Yadav, both residents of Village Mogal Bigha P.S.Kako (Pali) district Jerhanabad -

(Appellants) Versus STATE OF BIHAR------(Respondents) CR. APP (DB)
No.660 of 2002

1. Girija Ram son of Late Ram Prasiddh Ram

2. Janki Ram son of Late Shiv Nandan Ram

3. Kailash Thakur son of Late Pradip Thakur

4. Janak Yadav son of Late Chhathu Yadav, all residents of Village Mogal Bigha p.S.Kako (Pali) district Jehanabad-

(Appellants) Versus STATE OF BIHAR------(Respondents) CR. APP (DB)
No.678 of 2002

1.SHYAM NANDAN RAM son of Sri Girija Ram

2. Harakh Ram alias Harakh Prasad son of Late Chandar Prasad

3. Rajeshwar Prasad son of Sri Janak Yadav

4. Binod Ram on of Sri Subedar Ram

5. Rajaram Ram alias Raja Ram son of Sri Ramdeo Ram

6. Ganazuri Prasad alias Ganauri Yadav

7. Ram Uday Ram son of Sri Ram Jatan Ram

8. Umesh Ram son of Sri Janki Ram

9. Sideshwar Thakur son of Sri Chandradip Thakur

10. Bijeshwar Prasad son of Sri Siya Sharan Prasad, all residents of Village Mogal Biha P.S.Kako (Pali) district Jehanabad -----

(Appellants)

Versus

STATE OF BIHAR----- (Respondents) CR. APP (DB) No.681 of 2002

1. BALI CHOUDHARY

2. Krishna Choudhary

3. Hari Choudhary all sons of Sri Yadunandan Choudhary.

4. Yadunandan Choudhary son of late Ramcharan Choudhary, residents of Village Mogal Bigha P.S. Kako (Pali) district Jehanabd -----

----- (Appellants) Versus STATE OF BIHAR----- (Respondents)

For the Appellants:- Mr. Akhileshwar Prasad Singh, Advocate Mr. Bimal Kishore, Advocate For the State:- Mr. Lala Kailash Bihari Prasad, Sr. Advocate.

PRESENT THE HON'BLE JUSTICE SMT. MRIDULA MISHRA THE HON'BLE MR. JUSTICE SYED MOHAMMAD MAHFOOZ ALAM Mridula Mishra, J These four appeals were preferred by 20 appellants against the judgment and order of conviction dated 11.9.2002 passed by Sessions Judge, Jehanabad in Sessions Trial No.39 of 1993/ 5 of 1990 whereby Subedar Ram and Bijendra Yadav (Cr. Appeal No.722 of 2002) were convicted under Section 302 of the Indian Penal Code. All other appellants were convicted under Section 302/149 of the Indian Penal Code. Appellants in all four appeals were sentenced to undergo rigorous imprisonment for life. Subedar Ram and Bijendra Yadav were awarded a fine of Rs.2000/- and on failure to pay the fine to undergo rigorous imprisonment for six months. Other appellants besides being sentenced rigorous imprisonment for life were awarded fine of Rs.1000/- and on failure to pay the fine to undergo rigorous imprisonment for two months each.

2. These appeals have a chequered history. A criminal case initiated on 23.8.1988 on the basis of fard beyan of informant Nagendra Prasad recorded at 8.15 A.M. is still continuing as the case after conclusion of trial has travelled up to Supreme Court and thereafter remanded to the trial court for

re-trial. Finally against the judgment passed after re-trial, appeals preferred against impugned judgment have come for consideration. While appeals were pending before this Court three appellants of Cr. Appeal No.660 of 2002 namely Girija Ram, Janki Ram and Janak Yadav died, report was called for and considering the report of the Superintendent of Police, Jehanabad names of deceased appellants were expunged from the record of the case. Now there are 17 appellants whose case is to be considered by this Court.

3. The case of prosecution as disclosed in the fard beyan)Ext.3/1) of informant Nagendra Prasad, recorded by Ramayan Singh Sub inspector of Police, Pali police station on 23.8.1998 at 6.15 A.M. at Village Mogal Bigha is that the father of the informant namely Rajkeshwar Singh Pramukh of Kako Block, was sitting on the roof of the house at 7 P.M. on 22.8.1998 and listening to radio along with his mother Sumitra Devi, uncles Rajdeo Prasad and Gaya Prasad and brother Girija Prasad. Informant was also present there. At that time brothers of informant Yogendra Prasad, Surendra Prasad, Binay Prasad and Pappu Prasad, Sabal brother-in-law of Girija Prasad and sister Usha Devi were reading in a room situated on the roof of the house. At about 7.30 P.M. 15-20 criminals armed with rifle and gun came at the roof of the house through stair case. Father of the informant identified them and exhorted as to why Janakba had come to his house. Accused Jaanak Yadav on this, exhorted to his companions to kill him as he is the root cause of whole dispute. On his accusation Bijendra Yadav fired with his rifle and informant's father Raj Keshwar Singh died. Mother of the informant Sumitra Devi who tried to save her husband was shot by Subedar Ram resulting into her death at the spot.

4. Further case of prosecution is that in the light of the lamp burning at the roof accused persons who were armed with rifle and gun. The informant witnessing his parents having been killed, jumped on the thatched roof of Briksha Yadav which is adjacent to his house, in order to save his life. The accused persons continued to fire from north and east of the village and also enhancing threat to the villagers for not coming to the place or otherwise they would be killed. The informant has further stated that the accused persons kept the house under guard till 3 A.M. and while leaving the place of occurrence they raised slogan of I.P.F. Zindabad. The informant came back at the roof of his house only after accused persons left the place and found dead body of his father and mother lying there on the roof, blood spread all over the roof. Several empty cartridges were also found scattered near the dead body. Female members of the family informed that at the time of decamping the accused persons also committed loot in the female apartment and had taken away Rs.10,000/- cash, Gold ornaments, cloth and one radio valued at Rs.5,000/-. Uncles and brother of the informant who were on the roof had also jumped on the roof of Briksha Yadav. Younger brothers of the informant, studying in the room also informed that the accused persons after breaking open the door had entered inside the room as such they also identified some of the accused persons. Informant in his fard beyan has stated that his father was a respectable person and was working against peoples associated with I.P.F. by bringing their misdeed in the light. This was the reason that he was killed.

5. Kako (Pali) P.S. Case no.114 of 1998 was registered on the basis of fard beyan of informant Nagendra Prasad under Sections 147, 148, 149, 302 and 380 of the Indian Penal Code and 27 of the Arms Act. After investigation police submitted charge sheet in this case against 24 persons.

6. The defence of the accused persons was of false implication on account of admitted enmity. Defence of the accused persons was that in fact extremists had attacked the house of Raj Keshwar Singh at about 3 A.M. in the morning, killed him and his wife while sleeping on the roof of the house. None of the family members actually saw the occurrence. Subsequently when they came after departure of extremists, the dead bodies were noticed by them and thereafter information was sent to the police station through Chaukidar about the occurrence. The Station Diary entry was made on such information and thereafter the Investigating Officer arrived in the Village. At that very time a false story was concocted and fard beyan was recorded naming the present accused persons with whom the informant and his family has enmity.

7. The case was committed to the court of Sessions and the accused persons were charged for offence punishable under Section 396 of the Indian Penal Code. The trial court examined altogether 13 witnesses including Dr. Sanjay Jaiswal (P.W.11) and Ramayan Singh the Investigating Officer (P.W.13). P.W.1 Gaya Nand Prasad is the uncle of the deceased, P.W.2 Rajdeo Prasad is the brother of the deceased, P.W.3 Rajendra Prasad, P.W.4 Girja Prasad, P.W.5 Binay Prasad, P.W.6 Jogendra Prasad and P.W.12 Nagendra Prasad are sons of the deceased Rajkeshwar Singh and Sumitra Devi. P.W.8 Gaya Mani Devi and P.W.9 Sheela Devi are daughters-in-law of the deceased while P.W.10 Usha Devi is daughter of the deceased.

8. P.W.1, P.W.2, P.W.4 and P.W.12 (informant) claimed to be the eye witness of the occurrence. They have deposed that they all were sitting on the roof when accused persons arrived and in their presence Subedar Ram killed Rajkeshwar Singh and Bijendra Yadav killed Sumitra Devi. Other accused were also armed but the witnesses have not deposed that besides Subedar and Bijendra Yadav any other accused opened fire causing injury to any other person except the deceased. P.W.7 and P.W.9 have been tendered for cross examination. P.W.3, P.W.5, P.W.6 and P.W.10 have claimed to be inside the room situated on the roof of the house at the time of occurrence. P.W.8 Gaya Mani Devi claimed to have been on the roof of the house cooking food. Though other witnesses have stated that kitchen is situated at down stair in the female apartment.

9. The trial court considering evidence of prosecution witnesses was when going to deliver the judgment, found it expedient to alter/amend the charge. Accordingly on 11.8.1992 additional charge was framed. Bijendra Yadav and Subedar Ram were charged for offence punishable under section 302 of the Indian Penal Code and all other accused were charged for offence punishable under section 302/149 of the Indian Penal Code, besides charge earlier framed under Section 396 of the Indian Penal Code All the accused persons claimed to be tried for the altered charge and also filed a petition under Section 217 Cr.P.C. for cross examination of ten witnesses on the point of newly added charge. The witnesses were noticed by the trial court but out of 10 witnesses only P.W.5 was produced by the prosecution for cross examination. P.W.5 was not a witness on the point of actual murder. The judgment was delivered on 14.2.1994 and the trial court recorded following finding " Thus, on careful scanning of oral evidence, as well as critical analysis of defence story, I am of the considered opinion that prosecution has been able to prove the prosecution story against at least 21 accused persons. However, there is some controversy with respect to application of exact sections. Originally all accused persons were charged under Section 396 of the Indian Penal Code. Later on, on 11th August 1992 , on the date of delivery of judgment my predecessor had adjourned the date of

judgment and added further charge under Section 302 of the Indian Penal Code against Bijendra Yadav and Subedar Ram and charge under Section 302/149 of the Indian Penal Code against remaining."

10. The trial court by this judgment however had acquitted four accused persons of all the charges. Against the judgment of conviction dated 14.2.1994 two criminal appeals were preferred. The High Court set aside the judgment of conviction and order of sentence on the ground that the statement of accused recorded under Section 313 Cr.P.C. did not bear signature of accused persons and remanded the matter to hold the trial afresh. Against the judgment of acquittal no appeal was preferred by the State.

11. Appellants challenged the order passed by the High Court before the Supreme Court of India by filing S.L.P. No.494 and 495 of 1996. S.L.P. were admitted and numbered as Cr.Appel no.1812 and 1813 of 1996. The Hon'ble Supreme Court modified the order of the High Court to the extent that the trial was to begin from the stage of examination of the accused under Section 313 Cr.P.C. only instead of trial afresh. The Apex Court directed that after recording the statement of the accused under Section 313 Cr.P.C. as well as defence evidence, if any, the trial court will pass fresh judgment and order in accordance with law on the basis of prosecution evidence already recorded and the defence evidence which the appellant may lead after their examination under Section 313 Cr.P.C. On remand except four accused persons who were acquitted rest were put on trial. Their statement was recorded under Section 313 Cr.P.C. The accused persons thereafter examined seven defence witnesses in support of their defence. They were Mahendra Prasada (D.W.1), nephew of the deceased, Bachhu Kewat (D.W.2) next door neighbor of the deceased, D.W.3 Rajnandan Thakur is neighbor of the deceased, D.W.4 Raghunath Prasad neighbor and close agnate of the deceased. D.W.5 Raj Kishore Ram, D.W.6 Parsuram Ram and D.W.7 Rameshwar Kewat all are neighbors of the deceased. The trial court on conclusion of the trial convicted appellant Bijendra Yadav and Subedar Ram for offence punishable under Section 302 of the Indian Penal Code and other accused appellants for offence punishable under Sections 302/149 of the Indian Penal Code. No conviction was recorded under Section 396 of the Indian Penal Code and also under section 27 of the Arms Act as no charge had been framed against the accused under Section 27 of the Arms Act.

12. The first point which has been raised by Mr. Akhileshwar Prasad counsel appearing for the appellants is that the conviction of appellants under Section 302 as well as under Section 302/149 of the Indian Penal Code is illegal and perverse considering the fact that initially the appellants were charged for offence under Section 396 of the Indian Penal Code by the trial court by order dated 15.11.1990. The witnesses were examined by prosecution and at the stage of delivering the judgment the charge was amended and Section 302, 302/149 of the Indian Penal Code was also added under the amended charge. At this stage petition was filed by the accused persons under Section 217 Cr.P.C. showing their intention to cross examine ten witnesses on the point of amended charge. On petition of the defence prosecution was directed to produce ten witnesses for cross examination but prosecution failed to produce the witnesses except P.W.5. So far P.W.5 is concerned he has not deposed on the point of actual murder as such the defence had no opportunity to cross examine the witnesses on the point of amended charge under Section 302 and 302/149 of the Indian Penal Code. Section 217 Cr.P.C. provides that whenever charge is altered or added to by the Court, the

prosecutor and the accused shall be allowed to recall or re- summon witnesses already examined and re-examined with reference to such alteration or addition, unless the court, for reasons to be recorded in writing, considers that recalaling or re-examination of witness is vexatious or for the purpose of delaying or for defeating the ends of justice. This provision is to give appropriate opportunity to the accused to defend himself. The trial court in view of section 217 Cr.P.C. and having genuine doubt in this regard did not convict the accused persons under Section 302 or 302/149 of the Indian Penal Code. All accused were acquitted of the charge under Section 302, 302/149 of the Indian Penal Code. Admittedly no appeal was preferred by the State against the acquittal of the accused persons under Section 302/149 of the Indian Penal Code. In this circumstance when the matter was remanded back by the Apex Court to the trial court for re-trial starting from the stage of recording statement under Section 313 Cr.P.C. there was no fresh materiala or evidence before the trial court for convicting the appellants under Section 302 and 302/149 of the Indian Penal Code as the legal lacuna

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which was faced by the trial court earlier was still prevailing. In the circumstances the conviction of appellants under Section 302 and 302/149 of the Indian Penal Code is perverse, illegal and fit to be set aside.

13. Counsel for the appellants has further submitted that once the accused persons were acquitted of the charge punishable for offence under Sections 302 and 302/149 of the Indian Penal Code and it was affirmed for the reason that no appeal was preferred by the State against their acquittal. In this regard reliance has been placed by the counsel in the case of State of Andhra Pradesh- Vrs- T. Narayana reported in (A.I.R.1962 S.C.240). In this case the Apex Court while considering the scope of Section 423 (1) (b) (1) Cr.P.C. has held that It is clearly confined to cases of appeals preferred against orders of conviction and sentence, the powers conferred by this clause cannot be exercised for the purpose of reversing an order of acquittal passed in favour of a party in respect of an offence charged, in dealing with an appeal preferred by him against the order of conviction in respect of another offence charged and found proved. From the discussion in this judgment it transpires that if in any case an accused is charged for several offences and he is acquitted of some offence and convicted for other, the character of appellate proceeding will be confined to the order of conviction only if the order of acquittal is not challenged by the State. The assumption that whole case is before the High Court and it can entertain the appeal and against conviction as well as acquittal in an appeal preferred by the accused, is not correct. The High Court can alter the finding of conviction and not the finding of acquittal. What I find that in the decision relied upon by the appellants, the jurisdiction of the High Court under Section 423 (1) (b) (1) (2)

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Cr.P.C. while entertaining the appeal against the conviction has been considered. In the present case this was not the situation. The matter was remanded back to the trial court by the Apex Court for re-trial from the stage of Section 313 Cr.P.C. Every order passed by the trial court as well as the High Court subsequent to that stage was set aside. The effect will be that everything was wiped out and

there was a clean slate on which the trial court had to write its judgment again considering the evidence and material on record of the case. The order of conviction, the order of acquittal everything was set aside. In such a situation even if no appeal was preferred by the State against the acquittal of some of the charges that become irrelevant as the order of conviction as well as the order of acquittal become non existent. The trial court was directed to conduct trial and pass judgment and order afresh on the basis of prosecution as well as the defence evidence. Whatever has been done, the order of conviction by the trial court on this ground cannot be held to be illegal and without jurisdiction.

14. Further contention of the counsel for the appellant is that in the present case the prosecution has not examined any of the independent witnesses except the family members and close relatives even though the independent witnesses were available to the prosecution in order to corroborate the prosecution story. P.W.1,2, 3 and 12 who have claimed to be the eye witnesses of the occurrence are non else than the brother and sons of the deceased. Other witnesses such as P.W.3 ,4, 5,6 and 12 are the sons of the deceased. P.W.8 and 9 are daughter-in-law of the deceased and P.W.10 is the daughter of the deceased. Except them no other witness have been examined, when P.W.1,2,3 and 12 have admitted in their deposition that after firing was

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stopped they jumped on the roof of Rambriksha and Achchey lal and stayed in their houses till accused persons departed from the place of occurrence. P.W.1 in paragraph 8 of his deposition has stated that he jumped in the house of Achchy Lal where his family, his daughter-in-law and wife were present. He remained in the house of Achchy lal for 5-10 minutes. Thereafter village people namely Dukha Yadav, Birendra Yadav, Vijoy Yadav Musafir Kewat, Nirmal Kewat as well as several persons came at the roof where the dead bodies were lying. Similarly P.W.2 in paragraph 5 of his deposition has stated that he jumped into the house of Ram Briksha whose house is adjacent to the house of the deceased. P.W.3 in paragraph 5 and P.W.12 in paragraph 14 have stated that they jumped into the house of Briksha Yadav where female members of Briksha yadav were present. P.W.12 has stated that he told them about the killing of his father and mother by firing. He remained in the house of Briksha Yadav till 3 A.M. in the morning. He came again on the roof of his house along with Briksha Yadav. By this time several villagers had also come, whose names have been revealed by P.W.12. None have been examined as witness amongst villagers. None other than the female members were examined.

15. Counsel for the appellants has further submitted that the reason for non examination of any independent witnesses is that the prosecution story as disclosed in the F.I.R. as well as the evidence of witnesses is concocted and fabricated one. The occurrence took place in some other manner but in consultation with the Investigating Officer as well as on some villagers advise a false prosecution story was concocted in which appellants with whom the informant's family and deceased had admitted enmity were

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named and implicated as accused. The occurrence took place in the same manner which the accused persons have taken as their defence. The defence version of occurrence is also supported from the evidence of prosecution witnesses. P.W.12 on being cross examined denied that he had sent either chaukidar or Dafadar to give information at the police station regarding the occurrence; P.W.13 the Investigating Officer has stated in paragraph 2 of his evidence that on 23.8.1988 at 6 A.M. Mathura Gope Chaukidar of Village Mogal Bigha had come at the police station and reported that Rajkeshwar Singh has been killed by the extremists. Receiving such information he made Station Diary Entry no.336 dated 13.8.86 but did not institute F.I.R. He proceeded for village Mogal Bigha and there he recorded fard beyan of P.W.12. Counsel for the appellants has further contended that the defence of the appellants is that Rajkeshwar Singh and his wife were killed by extremists at 2-3 A.M. in the night when they were sleeping on the roof. Subsequently in the morning when his family members saw dead bodies, information was given at the police station through Chaukidar and on arrival of Officer-in-charge case was instituted implicating those persons as accused who were inimical to the informant and his family. Evidence of P.W.5, P.W.6, P.W.10 and P.W.12 have corroborated this fact that the accused persons remained present at the place of occurrence till 3 A.M. and when decamping they raised slogan of I.P.F.Zindabad. Defence witness no.1 Mahendra Prasad who is nephew of the deceased and cousin of the informant has also stated that the occurrence took place near about 2 A.M. in the night. Accused persons were strangers who after committing the offence left the place of occurrence raising slogan of I.P.F.Zindabad. He has also stated that

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non of the accused persons are members of extremists group. Similar statement has been made by D.W.2, D.W.3, D.W.4, D.W.5, D.W.6 and D.W.7. Since this part of deposition of the defence witness has also been corroborated by the prosecution witnesses only inference which can be drawn is that prosecution story has not been correctly revealed. Prosecution has suppressed real facts relating to manner of occurrence for the reason that, independent witness, would not have supported this fabricated story, as such no other than interested family members were examined as witness.

16. Counsel for the appellants has further contended that it is well settled that simply because only interested and family members have been examined as witness, prosecution case could not be disbelieved but in the back ground of admitted enmity, it was essential to examine independent witnesses to prove the prosecution story. Counsel for the appellants in support of his contention of admitted enmity has referred the documents brought by defence on record which were marked as exhibit without objection. The defence has exhibited F.I.R. of Kako P.S.Case no.34 of 1986, Kako P.S.Case no.35 of 1986 and Masaurhi P.S.Case no.167 and 174 of 1988 as Exdhibits A, A/1. A/2 and A/3 respectively. Certified copy of chargesheet of Kako P.S.Case no.34 of 1986 Ext.B and order of S.D.J.M. under Section 107 Cr.P.C. Ext.C. Counsel for the appellants submits that P.W.2 has also admitted enmity with accused persons. In the background of admitted enmity, on account of non examination of independent witnesses, inference can be drawn, that prosecution case is concocted and name of accused persons were falsely implicated.

17. Counsel for the appellants has further submitted that it was the

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duty of the prosecution to examine available independent witnesses. Non examination of independent witnesses also raises doubt against the genuineness of the prosecution. In support of this contention reliance has been placed on a decision reported in A.I.R.1978 S.C.59 (Bir Singh and others- Vrs- State of Uttar Pradesh). The Apex Court in this decision has held that it is not incumbent on the prosecution to examine each and every witnesses so as to multiply witnesses and burden the record. This rule however, does not apply whether the evidence of the eye witnesses suffers from various infirmity and could be relied upon if properly corroborated. Where all the eye witnesses examined by the prosecution had serious animus against the accused and were interested in implicating the accused and neither independent witnesses were examined nor any reasonable explanation was given by the prosecution, the court would be justified in drawing adverse inference against the prosecution. I find strength in the submission of the counsel for the appellants. In the background of admitted enmity and due to non examination of available independent witnesses by the prosecution, naturally adverse inference can be drawn against the genuineness of the prosecution case.

18. Further contention of the counsel for the appellants that another evidence on record which raises suspicion against the genuineness of prosecution case is non disclosure of names of accused persons by the prosecution witness before any one till arrival of Investigating Officer P.W.13. The prosecution case is that the occurrence took place at 7.30 in the night. The witnesses such as P.W.1,2,3 and 12 who claim to be eye witnesses jumped on the roof of Briksha Lal and Akshay Lal. P.W.1,2,3

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and 12 have said that they met Achchay Lal and Briksha Yadav as well as their family members. P.W.12 has said he came back to the place of occurrence at 3 A.M. only after departure of accused persons. All eye witnesses have stated that several villagers thereafter came at the roof. Name of some of the villagers have been disclosed by P.W.1,2 and P.W.12. However, P.W.1, 2 and P.W.12 have admitted that they did not disclose name of accused persons to any one. Counsel for the appellant has placed reliance on a decision reported in the case of Ram Ekbal Prasad and ors- Vrs- State of Bihar (2001 (3) P.L.J.R.289. In this decision the non disclosure of the names of the accused persons at the very initial stage by eye witnesses to any one was considered to be most unnatural conduct and subsequent disclosure of names of accused, after considerable delay as doubtful. The natural conduct of the eye witnesses would be that they would immediately disclose the names of accused persons to persons who arrived at place of occurrence. In the present case also the conduct of the witness by not disclosing the name of the accused whom they identified at the time of occurrence for complete 12 hours is un natural. This conduct of witnesses raises doubt and only inference which could be drawn is that they did not witness the occurrence but subsequently names of accused were disclosed in order to implicate them.

19. Counsel for the appellants has further submitted that the charge was framed against the accused persons under Sections 302, 302/149 and 396 of the Indian Penal Code. For the first time when the

trial court was going to pass the judgment, it was of the view that evidence on record is not sufficient to prove charge under Section 396 of the Indian Penal Code. Prosecution

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case was that accused persons when decamping took away cash and articles from female apartment in the ground floor. Two females examined as witness are P.W.8 and P.W.9. P.W.8 deposed that she was cooking food at the roof, as such, she was not supposed to see the looting. P.W.9 was tendered for cross examination. The trial court, faced with the situation altered/amended charge under Section 302, 302/149 of the Indian Penal Code. In spite of alteration of charge judgment of conviction could not have been passed under Section 302, 302/149 of the Indian Penal Code, as accused persons did not get opportunity to cross examine witness on amended charge. In this circumstance accused appellants could not have been convicted under Section 302, 302/149 of the Indian Penal Code. Accused persons got opportunity to cross examine witness only on charge under Section 396 of the Indian Penal Code. Section 302 being major offence than 396 conviction under Section 302 and 302/149 is illegal and in violation of the provisions of Criminal Procedure Code.

20. Chapter 17 of Cr.P.C. deals with charges. Section 216 Cr.P.C. provides for alteration/ addition of charge at any time before judgment is pronounced. The court has power to add to or alter a charge. Charge may be altered or added only when there is evidence to support it. Only precaution which the court has to take, while altering or adding the charge is that no prejudice should be caused to the accused and the prosecutor in conducting trial. In the present case I find that the charge was initially framed under Section 396. It was altered under Section 302 302/149 considering the evidence on record as the prosecution witnesses did not depose in support of dacoity rather their evidence was inclined to prove murder of Rajkeshwar

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Singh and his wife Sumitra Devi. Defence got sufficient opportunity to cross examine the witness on the point of murder, even before charge was altered. In fact charge was altered considering evidence on record. Accused persons have not been prejudiced, on account of not getting opportunity to cross examine the witnesses after alteration of charge, as they had already availed that opportunity before alteration of charge.

21. Counsel for the appellants has also contended that the trial court has committed serious error by not considering the defence evidence at par with prosecution evidence, even though defence version has in fact been supported by the prosecution witnesses in their deposition. In support of this submission reliance has been placed on a decision in the case of State of Haryana Vrs. Ram Singh (2002) II S.C.426. Where it has been held that the defence witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution. In the present case I find that defence version of the manner of occurrence, that extremists killed Rajkeshwar and his wife, has been supported by P.W.13, I.O. He stated that Mathura Gope, Chowkidar informed at police station regarding the incident and said that Rajkeshwar has been killed by extremists.

Similarly P.W.1, P.W.2, P.W.10 and P.W.12 have stated that accused persons at the time of departure raised slogan of I.P.F.Zindabad. This has also been deposed by defence witness. Defence witness are independent witness and their evidence should have been trusted by the trial court. Accused persons have taken this defence also in their statement under Section 313 Cr.P.C.

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22. Considering the aforementioned discussions I feel that the prosecution has not come out with clean hands. The circumstances of admitted animosity, non disclosure of names of the accused persons for complete 12 hours to any one, non examination of available independent witness and admission of the prosecution witnesses that the accused at the time of leaving the place of occurrence raised slogan of I.P.F.Zindabad, supported by the evidence of defence witnesses that the accused persons were strangers and members of extremists party who left the place of occurrence raising slogan I.P.F.Zindabad are sufficient to show that the prosecution has not been able to prove its case beyond all possible reasonable doubts, rather the prosecution has tried to conceal and suppress the available evidence. Benefit of these circumstances must go to the accused persons.

23. Accordingly the conviction of the accused appellants in all four appeals as well as the order of sentence is set aside. All the four appeals are allowed and the appellants are acquitted of the charge of Section 302 and 302/149 of the Indian Penal Code. Appellants Subedar Ram and Bijendra Yadav in Cr.Appeal No.722 of 2002 are in jail. They are directed to be released forthwith, if not required in any other case. Other appellants are on bail, they are relieved from the liability of their bail bonds.

(Mridula Mishra, J) (Syed Md. Mahfooz Alam,,J) Patna High Court The 23rd Dec, 2008
N.A.F.R./SSS

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