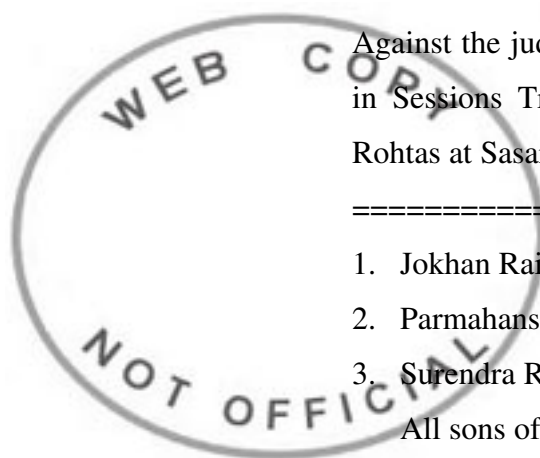




IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.32 of 1992

Against the judgment of conviction and order of sentence dated 25.03.1992 passed in Sessions Trial No.256 of 1988 by the learned 6th Additional Sessions Judge, Rohtas at Sasaram.

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- 1. Jokhan Rai,
- 2. Parmahans Rai,
- 3. Surendra Rai,
All sons of Late Baliraj Rai.
- 4. Bhuneshwar Rai,
- 5. Ram Pravesh Rai,
Both sons of Ram Chela Rai.
- 6. Ram Chela Rai, son of Late Ayodhya Rai.
- 7. Dinesh Rai,
- 8. Baikunth Rai,
Both sons of Santan Rai.
- 9. Santan Rai, son of Late Devraj Rai.
All residents of village-Jhalkora, P.S.- Bhagwanpur, District-Bhabua.

.... Appellants.

Versus

The State of Bihar.

.... Respondent.

WITH

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Criminal Appeal (DB) No. 100 of 1992

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- 1. Sarbjeet Rai, son of Deoraj Rai.
- 2. Gaya Rai, son of Deoraj Rai.
Both residents of village-Bhagwanpur (Karamchat), District-Bhabua (Rohtas).

.... Appellants.

Versus

The State of Bihar.

.... Respondent.

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Appearance :

For the Appellants : M/s Ashok Kumar Mishra, Varun Kumr, Pratibha
Srivastava and A.K. Giri, Advocates.
For the Informant : Mr. Ram Ishwar Chandra, Adv.
For the State : Mr. Ajay Mishra, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH

And

HONOURABLE JUSTICE SMT. ANJANA MISHRA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH)

Date: 12-01-2015

A supplementary affidavit has been filed sworn by one Akchhay Rai, son of appellant-Gaya Rai, stating therein that appellants-Jokhan Rai, Ramchela Rai and Santan Rai, who are all appellants in Cr. Appeal (DB) No.32 of 1992, have died during pendency of this appeal.

Having heard learned counsel for the appellants, learned counsel for the informant and the learned A.P.P., we have no reason to disbelieve in the said affidavit. In that view of the matter, we are not inclined to order any enquiry in the matter. The appeal in relation to these appellants, i.e., appellants-Jokhan Rai, Ramchela Rai and Santan Rai stand abated.

The prosecution case is based upon the fardbeyan of one Ranjeet Rai (P.W.5), who is the brother of the deceased Dharichan Rai, who is alleged to have been shot by the appellant-

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Sarbjee Rai. The fardbeyan is recorded at the police outpost Belaon of Bhagwanpur Police Station. It is, inter alia, alleged that on the evening of 06.07.1986 the informant found the accused persons trenching upon their agricultural land and cutting mud therefrom. This being objected to there was an altercation between the two sides. Appellant-Ganga Rai is supposed to have first fired injuring the deceased and then appellant-Sarbjee Rai fired at the chest of the deceased whereby the deceased died near his house. There were altercations between different parties. The informant had been assaulted on head and hand, others were also assaulted. Upon this fardbeyan being recorded, it was forwarded to Bhagwanpur Police Station where Bhagwanpur P.S. Case No.65 of 1986 was registered under Sections-147, 148, 149, 323, 324, 307 and 302 of the Indian Penal Code (hereinafter in short 'IPC') and Section-27 of the Arms Act. There were as many as 18 persons named in the F.I.R. so registered. Upon completion of investigation, police submitted charge-sheet only against 11, being the 11 appellants, in the two appeals before us. Seven accused persons were then summoned under Section-319 Cr.P.C. and added as accused but after trial all of them were acquitted. Thus, trial was conducted in relation to 18 persons out of whom only 11 persons were convicted. Upon charge-sheet being filed, the learned

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Magistrate took cognizance of the offence, as alleged, and committed the case to the Court of Sessions where charges were framed to which the appellants and others pleaded not guilty. They were tried and, as noted above, the 11 appellants were convicted. The rest were acquitted.

So far as the appellant-Sarbjeet Rai is concerned, he was convicted for offence under Section-302 IPC and sentenced to life imprisonment in respect of offence under Section-27 of the Arms Act. He was sentenced to 5 years rigorous imprisonment. Appellant-Gaya Rai was sentenced to life imprisonment under Section-302/149 IPC and further sentenced for offence under Section-27 of the Arms Act and sentenced to two years rigorous imprisonment. The rest of the appellants were all convicted under Section-302/149 IPC and sentenced to life imprisonment but some have been additionally sentenced under Section-323 IPC and, in respect whereof, they have been sentenced to six months imprisonment.

Learned counsel for the appellants states that there is a counter case as well being Bhagwanpur P.S. Case No.66 of 1986. It is based upon the grievous injuries received by the wife of the appellant-Sarbjeet Rai, who had received gun shot injuries and appellant-Gaya Rai. These injuries are neither mentioned in the

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fardbeyan nor stated by the prosecution at any point of time. They remained unexplained. These injuries have been duly proved in the trial by defence witnesses as examined. It is, accordingly, submitted that injuries, on the person of the accused, having not been mentioned nor explained, it must be held that the prosecution story is not correct or at least it does not give a correct picture for it. There is doubt with regard to the prosecution case as set up. In our view, learned counsel for the appellants is correct.

Further, learned counsel for the appellants has pointed out that the fardbeyan, the formal F.I.R., the inquest report and the case diary have all been proved by witnesses, Tyagi Kashinath Pathak (P.W.8) and Mahendra Prasad Singh (P.W.9). The injury report on the persons of the prosecution has been proved by Rajendra Prasad Singh, the Court witness. Learned counsel would submit that all these three witnesses are mere busy bodies. They are, what is commonly known as, 'Sankatmochan' witnesses, who had nothing to do with the case or the incident or the document sought to be proved. They are mere advocates' clerks and, thus, incompetent to prove the same. That being so, neither the fardbeyan nor the F.I.R. nor the injury reports nor the inquest nor any part of the case diary can be said to have been validly proved. Admittedly, the Investigating Officer has also not been

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produced in Court so as to testify as to the manner of occurrence or give his objective findings with regard to place of occurrence.

Having considered this submission, in our view, once again, learned counsel for the appellants is correct. No one can get up and prove any document. The documents have to be proved, as primary documents, i.e., the document in original, by the author of the document. Secondary evidence or secondary proof of evidence is permissible only when primary source cannot be used or proved and there is due explanation why the fardbeyan is not proved by the informant. If we look to the deposition of the informant which clearly states that though his statement was recorded and he has signed it as fardbeyan, the contents thereof was not read and explained to him. Thus, he was not competent to prove the fardbeyan. No further steps were taken to get the person to bring the Court to prove the same. Then, there is no evidence who and how the fardbeyan was registered as first information report. Similar is the case of the inquest report. What is most surprising is that when we come to the injury report of the informant and one other witness, the same is not proved by any prosecution witness even though the informant and the other witness, i.e., Ram Sushil Rai (P.W.4) are duly examined in Court. The injury in respect of them is proved by Court witness, Rajendra Prasad Singh. All these

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three witnesses, i.e., Tyagi Kashinath Pathak (P.W.8), Mahendra Prasad Singh (P.W.9) and Court witness, Rajendra Prasad Singh are none else than advocates' clerks. All they say is that they are familiar with handwriting. How they are familiar with the handwriting of the official persons? How they are connected with those officials? Nothing is stated. From the cross-examination of these three witnesses, it clearly appears that they did not even know them because the witnesses are unable to state the age of the persons who drew up the said documents. They are mere busy bodies. Their evidence is wholly incompetent. The document, as sought to be proved by them, cannot be accepted as duly proved.

P.W.9-Mahendra Prasad Singh is further brought to prove the case diary. Again, he is incompetent. This Court wonders why and how in view of the prohibition, as contained in Section-172 (2) Cr.P.C., case diary could at all be permitted to be proved and then used as evidence? The law clearly prohibits the same. How the trial Court permitted these things is not understood? Neither the advocate's clerk be permitted to give evidence as witness and stand to prove official document nor could any witness be permitted to prove the case diary. Yet for strange reasons, the trial Court did so.

Having given our anxious considerations to the

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aforesaid facts, in our view, the said documents, being wrongly proved, are not evidence in the case. The result is neither the Investigating Officer has been examined nor the person who recorded the fardbeyan nor has fardbeyan been duly proved nor the F.I.R. has been duly proved nor even the inquest report or the injury report of any nature have been duly proved.

We are of the considered opinion that in absence of these documents and in absence of these witnesses, the prosecution cannot under any circumstance succeed. Mere oral testimony, made years after the occurrence, corroborated by contemporaneous documents cannot be ground for conviction. We, accordingly, are constrained to allow this appeal and set aside the judgment of conviction and order of sentence dated 25.03.1992 passed in Sessions Trial No.256 of 1988 by the learned 6th Additional Sessions Judge, Rohtas at Sasaram. The appellants are freed from their bail bonds.

(Navaniti Prasad Singh, J.)

(Anjana Mishra, J.)

Trivedi/NAFR

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