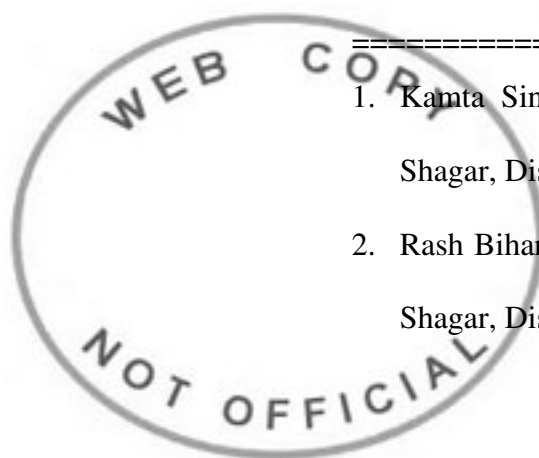




IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.872 of 2009

1. Kanta Singh S/O Sri Tengari Singh Vill- Dihara, P.O- Konar, P.S -Shiv Shagar, Distt-Rohtas
2. Rash Bihari Singh S/O -Shiv Dhoni Singh Vill- Dihara, P.O- Konar, P.S -Shiv Shagar, Distt-Rohtas

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

With

Criminal Appeal (DB) No. 797 of 2009

1. Manoj Singh @ Manoj Kumar Singh son of Sri Bishwanath Singh.
2. Dadan Dhobi, son of Sri Jawahir Dhobi
- Both residents of Village Dihara, P.O- Konar, P.S -Shiv Shagar, Distt-Rohtas

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance :

For the Appellants : Sri Kanhaiya Prasad Singh, Sr. Advocate with
Sri Jay Prakash Singh and
Smt. Fauzia Shakil, Advocates

For the State : Sri A. K. Sinha, APP and
Smt. Shashi Bala Verma, APP

For the Informant : Sri Vikram Deo Singh and
Sri Dharmendra Kumar Singh, Advocates

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CORAM: HONOURABLE SRI JUSTICE DHARNIDHAR JHA
and
HONOURABLE SRI JUSTICE AHSANUDDIN AMANULLAH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE DHARNIDHAR JHA)

Date: 11-05-2015

The four appellants were charged together for committing offence under Sections 302/34 Indian Penal Code by the learned Presiding Officer of Fast Track Court No. IV, Rohtas at Sasaram for being tried in Sessions Trial No. 119 of 2002/ Trial No. 153 of 2008. The appellants were held guilty of committing the said offence by judgment dated 17.08.2009. The learned trial Judge heard the appellants on sentence and directed each of the appellants to suffer rigorous imprisonment for life. The order of sentence indicates that appellant Kamta Singh was also held guilty of committing offence under Section 27 Arms Act and he had separately been convicted under Section 302 Indian Penal Code which order as regards the conviction of Kamta Singh under Section 302 Indian Penal Code does not appear inconsonance with the order of conviction. At any rate, we assume that appellant Kamta Singh had only been convicted



under Section 27 Arms Act besides being convicted under Sections 302/34 Indian Penal Code and was not inflicted any sentence for committing the offence under the Arms Act. The appellants being aggrieved by and dissatisfied with the judgment of conviction and order of sentence have preferred the two appeals to set up a challenge to its correctness as regards the judgment of conviction and the appropriateness as regards the sentence inflicted upon the appellants.

2. The two appeals have been heard together and are being disposed off by this common judgment.

3. P.W. 3 Ram Badan Singh had given his statement at the village of incident, i.e., village-Dihra within Sheosagar police station in the District of Rohtas alleging that he was coming from Sasaram after having gone there for marketing purposes and during that course he had gone to see his fields to have a glance of the seedlings and irrigation which had been provided to it while he was coming back to his village, he found that the deceased Gariban Mahto had been caught by the appellant Dadan Dhobi. Appellant Manoj Singh @ Manoj Kumar Singh caught the feet of the deceased and pulled it so as to feeling the deceased in a *nala*. The appellant Kamta Singh, after the deceased had fallen in the *nala* fired, two

shots from his country made gun while appellant Rash Bihari Singh dealt 2-3 blows with *chhura* to deceased Gariban Mahto.

4. The informant raised an alarm which attracted Dadan Singh, Uma Shankar Singh and Arjun Rai (none examined) to the scene of occurrence and they had also witnessed it and had identified the accused persons while they were running away. The deceased Gariban Mahto was bearing gun shot and *chhura* injuries and died very much in the '*nala*'.

5. It was alleged by the informant that the offence had been committed on account of the dispute for the land pertaining to a '*gali*'.

6. The Investigating Officer of the case has not been examined. We, as such, do not have any inkling as to how the investigation had proceeded, but what appears from the record is that the appellants were tried for the charge stated above and were held guilty for the offence.

7. The defence of the appellants was of false implication on account of land dispute. It was further pleaded that in fact no one had seen the occurrence and the witnesses had deposed falsely.

8. Four witnesses were examined by the prosecution during the trial out of whom P.W. 1 Dr. Shree

Bhagwan Singh had held postmortem examination on the dead body of the deceased Gariban Mahto and, as may appear from his evidence, had found the following injuries on the dead body:-

(i) A sharp cut wound 3" x 1" x muscle deep over left side of neck.

(ii) A sharp cut wound 1" x 1/3" rib deep over mid part of right side chest.

(iii) A sharp cut wound 3/4" x 1/4" x sternum deep over mid part of body of sternum.

(iv) A sharp cut wound 1/2" x 1/2" x rib deep over lower part of left side chest near sternum.

(v) A sharp cut wound 1/2" x 1/2" x rib deep over lower part of left side of chest near sternum.

(vi) A sharp cut wound 1/2" x 1/2" x muscle deep over left side epigastrium.

(vii) A sharp cut wound 2 1/4" x 1" x rib deep over lower part of left side chest near sternum extending over left hypochondrium (muscle deep).

(viii) A sharp cut wound 2" x 1/2" x rib deep over part of left side chest extending over left hypochondrium.

(ix) Four sharp cut wounds 1/2" x 1/2" x muscle deep, 1 1/4" x 3/4" x muscle deep, 1" x 1/4" x muscle deep, 1" x 1/3" x muscle deep over left lumbar region of abdomen.

(x) A sharp cut wound 2 1/2" x 1" x muscle deep over mid part of abdomen.

(xi) A sharp cut wound $\frac{3}{4}$ " x $\frac{1}{4}$ " x muscle deep $\frac{1}{2}$ " above umbilicus over mid part of abdomen.

(xii) A sharp cut wound $\frac{1}{2}$ " x $\frac{1}{2}$ " x skin deep over left shoulder.

(xiii) A sharp cut wound $\frac{1}{3}$ " x $\frac{1}{6}$ " x muscle deep over left side neck 1" below left angle of mandible.

(xiv) A sharp cut wound $\frac{1}{2}$ " x $\frac{1}{4}$ " x muscle deep over left intrascapular region.

(xv) A sharp cut wound $\frac{1}{2}$ " x $\frac{1}{4}$ " x muscle deep over right intrascapular region.

(xvi) A sharp cut wound 2" x $\frac{1}{2}$ " x muscle deep over left intrascapular region.

(xvii) A lacerated wound $\frac{1}{2}$ " in diameter x chest cavity deep with inverted margin surrounded by a colour of charred blackened tattooed skin $\frac{1}{4}$ " wide over left side chest in mid part (wound of entry).

(xviii) A lacerated wound $1\frac{1}{2}$ " in diameter x chest cavity deep with everted margin oozing dark fluid blood over right side neck (wound exit).

The above injuries were ante-mortem injuries and as may appear from the opinion rendered by P.W. 1, right Vth and VIth ribs were partially cut. The sternum was cut into depth of $\frac{1}{6}$ th", left Vth and VIth ribs were cut partially with VIIth, VIIIth, and IXth ribs. The pleural cavity was full with dark



fluid blood and both the lungs were lacerated, left being more lacerated than the right. The sharp cut wound was found on the anterior aspect of the left side of the heart in its whole length which was up to heart cavity and the heart was found cut through and through. The injuries were piercing the whole thickness of the heart and the right heart was cut entirely. The heart was bearing two sharp cut wounds measuring 1" x 1/4" x cavity and those injuries were at the tip of the heart. In the opinion of P.W. 1, death had occurred on account of shock and haemorrhage caused by the above mentioned injuries which could have been caused both by fire arm and sharp cut weapon within 12-18 hours of holding the autopsy on the dead body.

Thus, it does not appear in dispute that the deceased Gariban Mahto was shot at and at the same time was stabbed with sharp cutting wound, like, a *chhura* which had caused his death.

9. But that by itself is not going to substantiate the charges unless the evidence of witnesses could point out as to who were the persons who had perpetrated those acts of causing fire arm injuries or sharp cutting injuries to deceased Gariban Mahto which ultimately resulted in his death.

10. For the above purposes, the prosecution



examined three witnesses, P.W. 2 Malti Kuer who happened to be the wife of the deceased and who was not named in the F.I.R. as a witness who gave an eye witness account of the occurrence claiming herself also to have been assaulted in the same transaction so much so that the assault caused miscarriage of the lady who was quick with a child. P.W.3 was the informant of the case Ram Badan Singh, while P.W.4 was Puja Kumari who appears to be five years of age on the day of occurrence and ten years of age while deposing in the Court.

11. The criticism of the findings and the evidence which was coming from Shri Kanhaiya Prasad Singh, the learned senior counsel appearing on behalf of the appellants in these two appeals was that the evidence of the prosecution witnesses was fit to be rejected on its face value as their presence itself appears doubtful. It was also contended that if the Court had contrasted the evidence of the witnesses, it could have come to a conclusion that it was very difficult to hold that their evidence was lending any support to the charges and it was creating more confusion than adding clarity to it as regards the proof of charges. While making the above submission, Shri Singh had referred to the relevant part of the evidence of witnesses.



12. Ms. Shashi Bala Verma, the learned Additional Public Prosecutor assisted by Shri Vikram Deo Singh, learned counsel appearing on behalf of the informant initially resisted the submissions, but subsequently lost the momentum and became lukewarm in their submissions finally to concede that there are many pitfalls in the prosecution evidence which may not be justify the judgment of conviction.

13. The main defect in the prosecution case which was pointed to us by Shri Singh was that the prosecution story which was contained in the fardbeyan of P.W.3 did not have details as to how P.W.2 was assaulted and by whom. The only reason assigned by the informant that the occurrence was the outcome of a dispute between the parties for the land pertaining to a '*gali*'. We do not have any evidence on that part of the motive for committing the offence even from P.W. 3 but we assume that the '*gali*' was a common passage probably shared by both the sides. There was no whisper either in the fardbeyan that P.W.2 Malti Kuer, the wife of the deceased was even present at the place of occurrence, least to talk of stating in the document that she had intervened and then she was assaulted by persons other than the four appellants. We are very conscious of the legal position that the F.I.R. is not a substantive



piece of evidence but we are equally conscious of some of the observations of this Court also that nonetheless the document is the most potent of weapons in the hands of the defence to point out to the Court as to how the prosecution had improved upon its case. The other use of the document may be to find out as to who were the witnesses who indeed had seen the occurrence taking place. Both the uses of the document, like, the first informant report, in our opinion, appears quite available in the present case and Shri Singh was reading to us as to how the prosecution had added up stories by narrating that P.W.2 Malti Kuer had admitted to intervene when the deceased Gariban Mahto was coming with a basket with full of soil and when he fell, he was assaulted in the manner as stated by him in the fardbeyan. Shri Singh submitted rightly that if such an incident of assault of such a degree as to cause unconscious to the lady Malti Kuer who was assaulted by five other persons named by her and P.W.3 in his evidence, then there was no reason for the informant not to mention that story also which was very much the inseparable part of the same transaction. Shri Singh has rightly pointed out that P.W.3 has stated that Shyam Bihari Singh, Rajbansh Singh, Dadan Dhobi, Jai Ram Singh, Sanjay @ Khuti and son of Jai Ram Singh had assaulted the lady so much



so as to cause her unconsciousness and ultimately to cause the miscarriage of the child which was lying in her womb. The above fact was stated by P.W.2 also that she was assaulted by the above named persons when she went to intervene during the assault which was being administered to her husband. We uphold the contention of Shri Singh that it was such an important part of the same transaction which could be hardly to be missed by a person, like, the informant from being narrated even by way of referring as to what had ultimately happened fully in his view and in his presence. He was not narrating that incident and that had created a defect besides a handicap to us also inasmuch as the non-examination of the Investigating Officer had left a big void in the prosecution evidence and a great hurdle in our duty of appreciating the evidence as to whether really these witnesses had stated those facts to the Investigating Officer. We have to begin with a presumption that the witnesses had never stated that story and it was a rank improvement or addition to the narration which was contained in the fardbeyan of P.W.3.

14. P.W. 2 the wife of the deceased was questioned by defence during the course of her evidence as to why she did not give her statement to the police. She stated that



after she was rendered unconscious due to being assaulted as severely as to miscarry in the hospital, she did not give statement to the police. In fact, she stated that the police did not come to her to take her evidence. Her evidence invites queries from us. Firstly, if indeed she had been assaulted in the course of same transaction even this fact had not been brought to the notice of the police belated because it was not an ordinary part of the incident which could be overlooked or missed to be narrated to the police. She was intervening into the incident and during that course, she was beaten up to be rendered unconscious and only one person could have been aware of those facts of P.W.2 being beaten up and of being hospitalized on that account and we do not see any reason why the police had not brought on record that particular fact through its investigation. The lady had admitted that she did not give her statement to the police as appears from paragraph-10 of her (P.W.2) deposition. We find it very difficult to read her evidence to sustain support to the charges if her evidence was rendered inadmissible on account of the witness having not been questioned by the police.

15. The other defect or weakness in the prosecution evidence is that P.W.4, the little child of five years,



then on the date of occurrence, is always to be presumed to be in the company of her mother and if she had the maturity of perceiving things to retain them, then it is supposed that she had been equally a witness to the part of the incident. We have doubt that she had the maturity firstly to perceive the facts and then to retain them finally to relate them in Court because a five-year-old child living in the rural areas of the district of Rohtas may not have matured as enough to be a witness of such serious incident. But assuming for the sake of argument that she was present with her mother as per P.W.4, the mother and the daughter were present with the deceased Gariban Mahto inside the house in a room where her father was brutally assaulted by the accused persons and her mother on intervening was also assaulted by some of them. Thus, it was rightly submitted by Shri Singh that while the examination-in-chief, part of the evidence of P.W.4 appears the result of tutoring the evidence in paragraph-6 of P.W.4 may be treated as natural outcome of a child who was either telling the truth or was so confused not to know as to what she was narrating before the Court. That evidence of P.W.4 further compounds the situation as regards the competence of the witnesses, like, P.Ws. 2 and 4. Coming to P.W.3, the informant of the case, we find him contradicting his



own conduct which was recorded in the discharge of the official duty by the police officer who had recorded his fardbeyan. The document was recorded at the village at 1.30 A.M. on 27.06.2000. The witnesses during their examination in Court stated that after the incident, they had rushed to the police station in the night of 26.06.2000 itself and had met the Officer-in-Charge there to give their oral statement to him at 10:00 P.M. whereafter the investigation had been taken up. We do not have that statement which was given by P.W.3 as per his evidence at the police station at 10:00 P.M. We have a record which has a statutory presumption attached to it under Section 114 of the Indian Evidence Act as judicial and official records have presumption attached to them that the acts of making those records have regularly been performed. But why should we hold that P.W.3 had not gone to the police station to give his oral statement unless we had the investigating officer in the witness box to tell the court as to what really had happened. This situation again requires us to draw an adverse inference against the prosecution for non-examination of the Investigating Officer.

16. Now comes the turn to examine as to why the three persons who had been cited as witnesses in the F.I.R.



were not examined by the prosecution. Those were the persons who had seen the occurrence as appears from the document. We have already noted that the document could be used for the dual purposes of knowing as to what could the initial prosecution version as also to find out who were the persons who had been cited in it as eye witnesses to the occurrence. Dadan Singh, Uma Shankar Singh and Arjun Rai appear from the fardbeyan the witnesses to the occurrence. They were not examined. There is no explanation offered by the prosecution for their non-examination. Should not we suppose that if the three above named witnesses cited in the fardbeyan had come into the witness box, they had not supported the prosecution charges. This adverse inference also appears fit to be drawn on account of the non-examination of the three witnesses and absence of plausible explanation in that behalf.

17. The above are the reasons which create a situation of difficulty for us to hold that those could be reliable witnesses to sustain the conviction of the appellants. In fact, what we find is that the prosecution had failed to prove the charges satisfactorily with appropriate evidence. We hold that the charges were not proved.

18. In the result, the two appeals succeed and

are allowed. The four appellants are acquitted of the charges they had been held guilty of. Appellants Kamta Singh and Rash Bihari Singh of Cr. Appeal (DB) No.872 of 2009 are in custody, they shall be set at liberty forthwith if not wanted in any other case. The other two appellants, namely, Manoj Singh @ Manoj Kumar Singh and Dadan Dhobi are on bail. They shall stand discharged from the liabilities of their respective bonds.

(Dharnidhar Jha, J)

(Ahsanuddin Amanullah, J)

Anjani/Brajesh Kr./NAFR

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