

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.732 of 2016

Arising Out of PS.Case No. -352 Year- 2004 Thana -MAJHAULIA District-
WESTCHAMPARAN(BETTIAH)

=====

1. Nandu Sahani Son of Gauri Sahani @ Awadhesh Sahani, resident of Village- Lal Saraiya, Police Station- Majhuliya, District- West Champaran (Bettiah).

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

with

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Criminal Appeal (SJ) No. 713 of 2016

Arising Out of PS.Case No. -352 Year- 2004 Thana -MAJHAULIA District-
WESTCHAMPARAN(BETTIAH)

=====

1. Gauri Sahani @ Awadhesh Sahani son of Maharaj Sahni.
2. Nagina Sahani Son of Maharaj Sahni Both are resident of village - Lal Saraiya ,
Police Station- Majhauriya, District- West Champaran.(Bettiah)

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

=====

Appearance :

(In CR. APP (SJ) No.732 of 2016)

For the Appellant/s : Mr. Ajay Kumar Thakur, Adv
Mr. Nilesh Kumar, Adv
Mr. Amir Alam, Adv

For the Respondent/s : Mr. Binod Bihari Singh, APP
(In CR. APP (SJ) No.713 of 2016)

For the Appellant/s : Mr. Ajay Kumar Thakur
Mr. Nilesh Kumar
Mr. Amir Alam

For the Respondent/s : Mr. Binod Bihari Singh, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 28-11-2017

As both the above mentioned appeals arise out of Manjhauliya

P.S. Case No. 352 of 2004, which gave rise to two different Sessions



Trial i.e. Sessions Trial No. 367/2005 and Sessions Trial No. 367-A/2005 as such, both are being disposed of with this common Judgment, for the sake of convenience.

2. Appellant Nandu Sahni has preferred Cr. Appeal (SJ) No. 732 of 2016 by the appellants against the judgment dated 20.08.2016 and order of sentence dated 01.09.2016 and appellants Gauri Sahni and Nagina Sahni has preferred Cr. Appeal (SJ) No. 713 of 2016, against common judgment and order passed by Sri Rakeshpati Tiwary, 6th Additional District & Sessions Judge, Bettiah, West Champaran,, whereby the appellants were convicted for the offence punishable under Sections 304 (Part -1) and 34 of the Indian Penal Code and were sentenced to undergo rigorous imprisonment of seven years with a fine of Rs. 25,000/-.

3. Facts indispensable for adjudication of present appeal are that informant (P.W. 3) recorded his fardbeyan in the Sadar Hospital, Motihari, stating that in the marriage of his brother, which was held prior to four months of the present occurrence, they had not invited the appellants, who are the '*Pattidar*' of the informant and due to which they were not happy with the act of informant and his family members and three days prior to the occurrence, when his mother had gone to purchase tobacco, appellant Gauri Sahni came there and abused mother of informant, thereafter, she returned back to her house and narrated whole occurrence to her family members. On 5.10.2004



and 5. P.M., all the appellants came to the house of informant and started abusing them and, thereafter, appellant – Nagina Sahni ordered other appellant, namely, Nandu Sahni and co-accused Sudama Sahni to kill the father of the informant, on which, appellants Nandu Sahni and Sudama Sahni caught hold the father of informant and started assaulting the father of informant with lathi and appellant Gauri Sahni assaulted the father of informant by means of *Garasa* which hit the head of father of informant and blood started oozing out from his head and when the informant and his other two brothers rushed to save him, they also assaulted them, thereafter they took the injured to the Sadar Hospital, Motihari, for treatment, where he died during course of his treatment.

4. On the basis of above fardbeyan Majhauilya P.S. Case No. 352 of 2004 was registered against the appellants and police after investigation submitted charge-sheet against the appellants Gauri Sahni and Nagina Sahni under Section 302/34 of Indian Penal Code, showing appellant Nandu Sahni and co-accused Sudama Sahni as absconder. Later on appellant Nandu Sahni also surrendered and charge-sheet had also been submitted against him.

5. Both the cases were committed to the court of sessions, which gave rise to two different trials, which ultimately came to the file of Sri Rakeshpati Tiwary, 6th Additional District & Sessions Judge, Bettiah, West Champaran for trial and disposal.



6. Charges were framed under Section 302/34 of Indian Penal Code against the appellants in both the trials.

7. In Sessions trial no. 367/05 altogether seven witnesses have been examined from the side of the prosecution and they are: P.W. 1- Ram Chandra Sahni, P.W. 2- Guleniya Devi (wife of the deceased) P.W. 3-Kailash Sahni (son of the deceased and informant of this case), P.W. 4- Paras Sahni (son of the deceased, P.W. 5 – Satan Sahni (Son of the deceased), P.W. 6- Bipin Kumar (Second Investigating Officer) and P.W. 7- Narendra Prasad Verma, (posted as Dresser in Sadar Hospital, Motihari). In Sessions Trial No. 367 –A/05, P.W. 1, P.W. 6 and P.W. -7 had not been examined.

8. Apart from the above, following documentary evidences have been admitted into evidence and marked as ; Ext. 1 – Signature on oral statement, Ext. 1/1- Signature of Satan Sahni on oral statement, Ext. 2 – Fardbeyan Ext. 3- Post mortem report.

9. It appears from perusal of the records that neither any oral nor any documentary evidence has been adduced on behalf of the defence and it appears from the statement of the appellants recorded under Section 313 Cr.P.C, the defence of the appellants is of innocence and false implication and further defence is that the deceased received injuries at some other place and due to which he died and the appellants being innocent have falsely been implicated in this case.

10. Learned Trial Court after conclusion of trials, convicted the



appellants in both the trials, under Section 304(Part -1) and 34 of the Indian Penal Code and sentenced them as stated above, vide common judgment.

11. Aggrieved by the said judgment, the appellants preferred these appeal.

12. Submission of learned counsel for the appellants that out and out false and fabricated allegations have been levelled against the appellants and no such occurrence as alleged, in the fardbeyan has ever taken place. It has also been argued that P.W. 1, 2, 3, 4 and 5, though claim themselves to be eye witness of the occurrence but evidence of P.W. 2, who is the wife of deceased, shows that at the time of alleged occurrence, she was inside the house with her daughter in-law and she came out after hearing the screaming sound of his husband and found that her husband lying on the door of the house in an injured condition. Her evidence in para -6 of her cross examination also shows that when the accused persons fled away, Kailash (P.W. 3), Paras (P.W.4) and Satan (P.W.5) came. Further submission of learned counsel for the appellants is that there are contradictions between the evidence of P.W. 3 & 4 and P.W. 1 & 2, as evidence of P.W. 3 & 4 disclose that on the order of appellant Nagina Sahni, appellant Gauri Sahni assaulted the deceased on his head by means of *farsa* while other accused persons, namely, Nandu Sahni and Sudama Sahni had caught hold of the deceased, whereas evidence of P.W. 5



shows that appellants, Sudama Sahni and Nandu Sahni caught hold of the deceased and appellant Nagina Sahni assaulted the deceased by means of *lathi* and, thereafter, appellant Gauri Sahni assaulted him by means of *farsa* on the head of informant. Whereas, evidence of P.W. 1&2 only disclose about assault by appellant Gauri Sahni. The evidence of P.W. 1 in his cross-examination has come with a case that there was land dispute between the parties, whereas all other witnesses have stated in their evidence that there was no land dispute between the parties.

13. It has also been submitted that though a Government Hospital was available in the village but surprisingly they did not take the deceased there rather they took him to Motihari Hospital, which is far away from the village and this fact also casts a serious doubt about the place and manner of occurrence and further the motive assigned by the P.W. 2, 3, 4 and 5 behind the occurrence that earlier they did not invite the appellants in the marriage of one of the brothers of the informant and due to which they were annoyed and committed this offence, does not seem probable as no person would commit such an offence for these trivial matters.

14. It has also been argued that non-examination of I.O., though not relevant in all the cases, but in this case has certainly caused prejudice to the defence side as all the witnesses have stated that they had also been assaulted by the appellants when they went to save their father,



however, there is no injury report available on record to substantiate this facts and further they also claimed that the blood was found fallen on the ground and in such a situation non – examination of the I.O. in this case has proved to be fatal for the defence.

15. Further argument of learned counsel for the appellants is that even the postmortem report has not been brought on record to show the cause of death and doctor has not been examined in this case and it is said that the doctor, who prepared postmortem report, died during pendency of the case and the postmortem report was proved by dresser, who is not a competent person, which has caused serious prejudice to the appellants. In support of this contention, learned counsel for the appellants has relied upon an unreported Division Bench Judgment of this Court in the case of **Rajeev Singh @ Rajeev Kumar vs. State of Bihar in Criminal Appeal (DB) No. 1310 of 2017 dated 02/03/2017**. On the basis of above submission, learned counsel for the appellants has submitted that the learned Trial court, without appreciating the above infirmities has convicted the appellants under Section 304 (Part -1) and 34 of the Indian Penal Code, which is not sustainable in the eye of law and if allowed to continue, the same would result in travesty of justice.

16. On the other hand, learned counsel for the State has countered the submission of learned counsel for the appellant and has submitted that there are consistent materials available on record to show that



appellants out of their revenge has committed such an offence, which is substantiated by the evidence of P.W. 1 to 5, who have clearly stated that appellant Gauri Sahni assaulted the deceased on his head by means of *farsa* whereas other appellants have assaulted the deceased by means of *lathi* and though in this case doctor has not been examined but material is available on record to show that the doctor had died during the pendency of the case, as such, post mortem report is admissible under Section 32(2) of the Indian Evidence Act, which has been proved by the dresser of the hospital, who identified the handwriting and signature of the doctor and hence there is no infirmity in impugned Judgment convicting the appellants under Section 304 (Part -1) and 34 of the Indian Penal Code.

17. In the background of above facts, this court intends to examine the evidences of witnesses available on record.

18. P.W. 1 – Ram Chandra Sahni, has stated in his evidence that it was 5.00 P. M. and he was at his door and saw appellants came to the house of the deceased and appellant Nagina Sahni assaulted him on his head by means of *lathi*, whereas appellant Gauri Sahni assaulted the deceased on his head by means of *Garasa* and, thereafter, the deceased fell on the ground and when sons of the deceased came to save him, they had also been assaulted by the appellants, thereafter, villagers assembled and accused persons fled away from the place of occurrence and the deceased died during course of his treatment. This



witness has stated in his cross-examination that earlier there was a land dispute between the parties and a proceeding under Section 144 Cr.P.C. was also there.

19. P.W. 2 – Guleniya Devi (wife of the deceased) has stated in her evidence that appellants came at the door and on the order of appellant Nagina Sahni, appellant Gauri Sahni assaulted on the deceased, which hit his head and when P.W. 3, P.W. 4 and P.W. 5 went to save the deceased, they also assaulted them and on alarm, people assembled there and appellants fled away. Further her evidence in cross-examination disclosed that there was no land dispute between the parties. Her evidence in cross examination also shows that she was inside her house with her daughter in law and came out after hearing the screaming sound of her husband and found her husband lying on the door in an injured condition. Her evidence in cross –examination also shows that her sons P.W. 3, P.W. 4 and P.W.5 came at the place of occurrence when appellants had fled away. This witness has been examined in Sessions Trial No. 367-A/05 as P.W. 1 and she has deposed almost similar as in the present case.

20. P.W. 3 – Kailash Sahni (informant and son of the deceased) has stated in his evidence that at 5.00 P.M., he along with his brothers and father was at his door and appellant Gauri Sahni armed with *farsa*, appellant Nandu Sahni armed with rod and appellants Nagina Sahni and Sudama Sahni armed with *lathi* came there and on order of



Nagina Sahni, appellants Nandu Sahni and Sudama Sahni caught hold of the deceased and appellant Nagina Sahni assaulted the deceased by means of *lathi* and appellant Gauri Sahni assaulted the deceased by means of *farsa* and when he along with his brothers rushed to save the deceased, appellants also assaulted them, thereafter, they took their father to the Motihari for his treatment, where, he succumbed to his injuries. In his cross-examination, this witness has admitted that there was no land dispute between the parties. This witness has been examined in Sessions Trial No. 367-A/05 as P.W. 4 and has deposed almost similar as in the present case.

21. P.W. 4 – Paras Sahni (son of the deceased) has disclosed in his evidence that at 5.00 P. M. accused persons variously armed came to his house and appellant Gauri Sahni on the order of Nagina Sahni, assaulted on the head of his father and due to which he fell down and when he along with his brothers went to rescue their father, appellants also assaulted them. It has been stated that four months prior to the occurrence, there was a marriage of his younger brother, in which they had not invited the appellants and due to which they had committed the present occurrence. His evidence further disclosed that the police was not informed on the date of occurrence rather they informed the police next day. This witness has been examined in Sessions Trial No. 367-A/05 as P.W. 2 and he has deposed almost similar as in the present case.



22. P.W. 5 – Satan Sahni (son of the deceased) has stated in his evidence that at 5.00 P.M. appellants, variously armed, came to his house and appellant Nagina Sahni ordered to kill the deceased, on which, Nandu Sahni and Sudamad Sahni caught hold of the deceased and appellant Nagina Sahni started assaulting him by means of *lathi*, whereas appellant Gauri Sahni assaulted him by means of *farsa* due to which he fell down and when his brothers went to rescue the deceased, they had also been assaulted by the appellants, thereafter, people assembled and appellants went back to their houses and he took his father to Motihari, where he died in the next morning during course of his treatment. This witness in his cross-examination has admitted that there was no land dispute between the parties. This witness has been examined in Sessions Trial No. 367-A/05 as P.W. 3 and has deposed almost similar as in the present case.

23. P.W. 6 – Bipin Kumar is second Investigating Officer of this case and has admitted in his evidence that he took over the investigation of this case from Sub – Inspector, Mahendra Prasad Yadav and had filed charge-sheet on the basis of earlier investigation. This witness has marked formal F.I.R as Ext. 2 and Fardbeyan as Ext. 3.

24. P.W. 7 – Narendra Prasad Verma and he has admitted in his evidence that he was posted as dresser on 04.10.2004 along with Doctor – Ashok Kumar Gupta and he has admitted that the Doctor



had died. This witness has identified the handwriting and signature of doctor on the post mortem report, which has been marked as Ext. 4.

25. P.W. 6 and P.W. 7, have not been examined in Sessions Trial No. 367-A/05.

26. Materials available on record, discloses that in this case, doctor has not been examined as he died during pendency of the case, though post mortem report has been brought on record and proved by the dresser, who proved the handwriting and signature of the doctor and the court below has also found the postmortem report admissible under Section 32(2) of the Indian Evidence Act. However, he is not a doctor or expert nor there is any evidence that he was present at the time of postmortem. Learned counsel for the appellants has vehemently argued that even if the doctor, who conducted post mortem examination was not alive, prosecution ought to have examined any specialist in the medical field to get the postmortem report proved/examined so that the defence might got a chance to cross – examine him on the actual cause and nature of injuries and denial of the same has caused serious prejudice to the defence. In support of his contention, learned counsel for the appellants has relied upon an unreported decision of Division Bench of this Court in the case of **Rajeev Singh @ Rajeev Kumar vs. State of Bihar** (supra), in which, aforesaid question was discussed in para -44, which is being reproduced henceforth:-



“In the case of **Sowam Kisku & Ors v. The State of Bihar, reported in 2006 Cri. L.J.2526**, the Jharkhand High Court noticed that the post mortem report was proved by a Compounder attached to the hospital. Declining such practice, the Jharkhand High Court observed that the contents of the post mortem report cannot be used by examining the compounder of the hospital, who had no knowledge about the opinion expressed by the Doctor. Further more, the post mortem report is not document which falls under section 293(4) Cr.P.C. nor the prosecution has taken recourse to Section 294 Cr.P.C. However, the Division bench of Jharkhand High Court observed that if any other Doctor had been examined who knew the signature of the Doctor who conducted autopsy, and who had given evidence as to the nature of post mortem done and the injuries found by the Doctor on the dead body, then in such circumstances the appellants would have had an opportunity to cross-examine the said Doctor to profess their case that injury suffered was not fatal in nature or that the said injuries are not sufficient in the ordinary course of nature to cause the death of the deceased or that the said injuries are likely to cause death. The prosecution by not examining the Doctor in fact had denied the opportunity to the accused appellant as they were prevented from cross-examining the competent person, who would be well equipped in medical science. It would be apt to quote paragraphs 8 and 9 of the judgment are quoted herein below:

“8. We are unable to understand as to why the prosecution did not choose to examine the doctor. It is no doubt true that in spite of the steps taken, the prosecution could not procure the attendance of the doctor who conducted autopsy over the dead body, but that could not have precluded the prosecution from examining some other doctor from the same hospital who knew the handwriting and signature of the doctor who conducted autopsy. If any other doctor had been examined who knew the signature of the doctor who conducted the autopsy and if he had given evidence as to the nature of post mortem done and the injuries found by the doctor on the dead body, then the appellants could have had an opportunity of cross-examining the said doctor to say that the injuries suffered by the deceased are not fatal in nature and even if the deceased died on account of such injuries, the accused-appellants could have taken a defence to say that the said injuries are not sufficient in the ordinary course of nature to cause the death of the deceased or that the said injuries are only likely to cause the death. The prosecution by not examining the doctor denied the opportunity to the accused-appellants as they were prevented from cross-examining the doctor. Therefore, in absence of any evidence that Dugu Ram Kisku died due to homicidal violence, we cannot find the appellants guilty of murder.

9. A perusal of Section 60 of the Evidence Act shows that in all cases wherever it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on this



ground and the prosecution having not examined the doctor and not giving an opportunity to the accused to cross-examine him, cannot rely upon the evidence of P.W.11 and mark Ext.5, the post mortem certificate through him. It is needless to mention that the doctor who conducted autopsy and expressed opinion in the post mortem certificate, was not examined and therefore the compounder, P.W.11, is not a competent witness to speak about the cause of death; more so when he has admitted in his cross-examination that he was not present at the time of post mortem and that he also did not know about the opinion expressed by the doctor who conducted autopsy. At this stage we wish to make an useful reference to Section 293, Cr.P.C. which contemplates that any document purporting to be a report under the hand of a Government Scientific Expert to whom the Section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding, may be used as evidence in any inquiry, trial or other proceeding. Sub-section (4) of Section 293 classified the reports of the Scientific Experts. Post-mortem report is not one of those documents which falls under sub-section section (4) of Section 293, Cr.P.C.

27. From perusal of the above judgment, it can safely be said that prosecution by not examining any doctor has denied the opportunity to the defence as they were prevented from cross-examining the competent person, who will be well equipped in medical science. Further the Divisions Bench in para -48 to 51, of the said Judgment held that :-

“48. The right and liberty of an individual, guaranteed under Article 21 of the Constitution of India, if any prejudice is caused to the accused in a criminal trial, the benefit will be given to him and not to the prosecution and that is why the Court observed as to what would be the probative value of the document which is admissible under section 32 of the Evidence Act but proved by a person who is incompetent to understand the contents of the documents.

49. The Orissa High Court has raised the issue in the case of *Hadi Kirsani vs State* (*supra*) and the Rajasthan High Court in the case of Mathura *Lal Tara Chand* (*supra*). The Jharkhand High Court too observed in case of *Sowam Kisku* (*supra*) that in absence of the doctor, if any other doctor has been examined, who knew the



signature of the doctor who conducted autopsy, and if he had given evidence as to the nature of post mortem done and the injury found by the doctor on the dead body, then the appellant could have had the opportunity to cross-examine the said doctor to opine, that the injuries suffered by the deceased are not fatal in nature or that even if the deceased died on account of such injury, the same was not sufficient in ordinary course to cause death of the deceased or that the said injury are likely to cause death.

50. In our considered view, the non-examination of a competent doctor, in absence of the doctor who authored the document, even if admissible under section 32 of the Evidence Act, so proved by a Compounder merely someone conversant with his handwriting, would virtually amounts to denial of an opportunity to the accused as they are prevented from cross-examining the doctor who could have addressed the intricacies of the report, for no fault of their own. Being conscious of such situation, the Hon^{ble} Apex Court in the case of *Vijender (supra)* held that in exceptional cases where any of the prerequisites of Section 32 of the Evidence Act are fulfilled, the post mortem report can be admitted in evidence as the relevant fact in sub-section (2) thereof by proving the same through some other competent witness which obviously is referred to a doctor with equipped in medical science to answer the question with respect to contents of the report. It also goes to show that even under section 32 of the Evidence Act, the post mortem report though admissible would be relevant when a competent witness come and depose about the same otherwise it will shake the very edifice of criminal jurisprudence that if any prejudice is caused, the benefit would be given to him and not to the prosecution.

51. We, accordingly, hold that if a post mortem report or injury report is proved by a witness in terms of any of the circumstances enumerated under section 32 of the Evidence Act, such evidence would be admissible in evidence. However, such evidence would not have any probative value unless and until the same is proved by any other doctor who is well equipped in medical science and competent to answer the question on the merits of the report as the defence would be deprived of cross-examination on the contents of the report, which would be prejudicial to its interest. We answer this situation accordingly.”

28. In view of the above judgment, though the postmortem report is admissible under Section 32(2) of the Indian Evidence Act, however, prosecution has certainly caused serious prejudice to the defence by not examining any competent person of medical science and they are entitled for benefit of the same.



29. It further appears that there are several contradictions amongst the evidences of prosecution witnesses P.W. 1 to 5 as P.W. 1 has stated in his evidence that there was land dispute between the parties, whereas P.W. 2 to 5 have denied this fact. Further there is two types of evidence available on record, so far manner of occurrence is concerned, as evidence of P.W. 1 & 2 shows about assault only by appellant Gauri Sahni and no active involvement of other appellants, whereas the evidence of P.W. 3 to 5 shows about participation of all the accused persons, including appellants. It has also come in the evidence of P.W. 3, 4 and 5 that when they went to save their father, they were also assaulted by the appellant, however, there is no medical report/injury report available on record to substantiate this fact and it is also the fact that in this case I.O. has not been examined. had he been examined, he would have thrown light on the manner of occurrence and about the injuries received to P.W. 3, P.W. 4 and P.W. 5. So far motive assigned by the witnesses that prior to four months, there was a marriage of younger brother of the informant, in which they had not invited the appellants, for which the appellants have committed such an offence, does not seem probable. Further the evidence also shows that both the parties are not inviting each other in their functions. Moreover, evidence of P.W. 2 in cross-examination rules out the presence of P.W. 3, P.W. 4 and P.W. 5. at the place of occurrence at the time of occurrence.



30. Considering the infirmities discussed above, in totality, I find that Trial Court has not considered the infirmities discussed above and failed to consider that the prosecution has failed to prove the manner, motive of occurrence and cause of death beyond all shade of reasonable doubts. Hence the appellants in both the appeals are entitled for benefit of doubt.

31. Accordingly, these appeals are allowed and judgment dated 20.08.2016 and order of sentence dated 01.09.2016 passed by Sri Rakeshpati Tiwary, 6th Additional District & Sessions Judge, Bettiah, West Champaran, in S.T. No. 367/05 and 367-A/05, are set aside.

32. As the appellant- Nagina Sahni, is on bail, he is discharged from liabilities of bail bonds and so far appellants, namely, Nandu Sahani and Gauri Sahani @ Awadhesh Sahani are concerned, they are directed to be released forthwith if not required in connection with any other case.

(Vinod Kumar Sinha, J)

sunil/-

AFR/NAFR	AFR
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