

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.630 of 2013

Arising Out of PS.Case No. -41 Year- 2013 Thana -PARAIYA District- GAYA

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Mithlesh Yadav S/O Late Gangu Yadav Resident Of Village- Pipra, P.S.- Paraiay,
District- Gaya

.... Appellant/s

Versus

The State Of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Baxi S.R.P. Sinha, Sr. Advocate
Mr. Mrigendra Pratap Singh

For the Respondent/s : Mr. Satya Narayan Prasad, APP

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL
AND

HONOURABLE MR. JUSTICE SANJAY KUMAR

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)

Date: 21 -03-2017

The sole appellant was tried and convicted under section 302 I.P.C., Section 27 of the Arms Act and Section 3(2)(v) of the SC/ST (Prevention of Atrocities) Act (for short 'the Act') vide the judgment of conviction dated 14th May, 2013 passed by learned Additional Sessions Judge-I-cum-Special Judge, Gaya in SC/ST Trial No. 01 of 2011 (arising out of Paraiya P.S. Case No. 41 of 2010). By order of sentence dated 22.5.2013, the appellant was directed to undergo R.I. for life and to pay fine with default clause under section 302 I.P.C., R.I. for 03 years and to pay fine with default clause under section 27 of the Arms Act and R.I. for 10 years with fine with default clause under section 3(2)(v) of the Act.



2. P.W.-3, the wife of the deceased, lodged the fardbeyan on 20.04.2010 at 6.45 a.m. at the Emergency Ward of the hospital itself before the Station House Officer of Paraiya Police Station (P.W.-8) alleging that the deceased along with the informant and their children were sleeping in the night of 20.04.2010 at the roof top of the house. At about 12 o'clock, 4 to 5 culprits came over the roof top and after removing the cover (chadar), the deceased was identified and one of them namely, the appellant, fired three shots at the deceased from his pistol which hit him on his chest, stomach and below the shoulder. Pinki Devi (P.W.-7) was also sleeping on the adjoining roof top. The accused persons also assaulted her with fire arm causing injury on her head. Thereafter, all the accused persons through the stairs of the house came down and escaped from the main door after breaking open the lock. On recording the fardbeyan, the investigation was taken up by the Investigating Officer. The death inquest proceeding was carried out by him in presence of P.Ws.-1 and 2 on 20.04.2010. The dead body was sent for post-mortem examination. P.W.-9 Dr. Arvind Prasad who was then posted as the Head of the Department at Magadh Medical College and Hospital, Gaya conducted the autopsy on the cadaver on 20.04.2010 at 12.15 p.m. and submitted the report (Ext.5).The Investigating Officer visited the place of occurrence and collected the blood stained cloth and shells of the two empty



cartridges from the roof top under a seizure memo (Ext.4). Thereafter, the statement of the witnesses was/were recorded. On finding the accusations against the appellant true, he led the charge-sheet on 7.8.2010 whereon cognizance was taken and the case was later committed to the Court of Sessions. On transfer, the case came on the file of the Court of learned Special Judge on 07.01.2011 wherein charges were framed under sections 302 and 34 of the IPC, section 27 of the Arms Act and Section 3(2)(v) of the Act and read over and explained to the appellant to which he pleaded not guilty and claimed to be tried. The defence took the plea of his false implication.

3. In order to prove the charges beyond shadow of reasonable doubts, the prosecution examined altogether 11 witnesses. P.W.-1 Rajesh Chaudhary is the brother of the deceased. P.W.-2 Surendra Chaudhary is cousin nephew of the deceased. He is a witness of seizure of the two empty cartridges and the blood stained cloth from the roof of the house of the informant. P.W.-3 Kiran Devi is the informant herself being the wife of the deceased and sole eye witness to the occurrence in the present case. P.W.-4 Dinesh Paswan is the person on whose auto rickshaw the two injureds were carried to the hospital. P.W.-5 Birendra Kumar Chaudhary is again a cousin of the deceased and witness to the seizure of blood stained cloth and empty shells cartridges from the roof top which is said to be the place of



occurrence. P.W.-6 Ram Khelawan Chaudhary is the father of the deceased. He is a hearsay witness who rushed to the place of occurrence after the incident and arranged the transportation of the injureds to the hospital.P.W.-7 Pinki Devi is a married niece of the deceased who was sleeping on the adjoining roof top on the relevant night. According to the prosecution, she too received injury in the occurrence on her head. However, the prosecution has not relied on her evidence and she was declared hostile half way through her deposition. P.W.-8 Pramod Prasad Singh is the Investigating Officer who recorded the fardbeyan, prepared the inquest report, obtained the post mortem report and effected seizure of the incriminating articles from the roof top. P.W.-9 Dr. Arvind Prasad is the doctor who held the autopsy on the dead body of the deceased and proved the post mortem report (Ext.5). P.W.-10 Dr. Srikrishna Ranjan is the doctor who is said to have treated P.W.-7 of her injury. P.W.-11 Jamuna Chaudhary is father of P.W.-7 and an agnate of the deceased. He has not fully supported the prosecution case. The learned Trial Court has not placed reliance on his evidence. The defence has not adduced oral or documentary evidence. Upon conclusion of the evidence, the statement of the accused was recorded under Section 313 Cr.P.C. On a critical analysis of the evidence adduced by the prosecution, the learned Trial Court held the appellant guilty and sentenced him in the



manner stated above.

4. We have heard Sri Baxi S.R.P. Sinha in support of the appeal and Mr. Satya Narayan Prasad, APP for the State.

5. Before we delve into the merit of the case, it may be stated that the death caused to the husband of P.W.-3 (informant) on the relevant date and time of the occurrence has not seriously been challenged. We would, however, note that P.W.-9 Dr. Arvind Prasad who was then posted as the Head of the Department in Magadh Medical College, Gaya conducted the post mortem examination of the deceased at about 12.15 p.m. duly identified by the Chowkidar and found the following ante mortem injuries:-

“(i) Entry wound $\frac{1}{2}$ ” x $\frac{1}{2}$ ” x chest cavity deep at midcavicular line in the left south space with fracture of underlying rib. The margin of wound was irregular with abrasion collar around with margin and tattooing in an area of 3 $\frac{1}{2}$ ” diameter spread over left interior chest wall.

Injuries No. (ii) Exit wound $\frac{3}{4}$ ” x $\frac{1}{2}$ ” x chest cavity deep at left side of back at scapular region at the level of T-8 vertebra with fracture of scapula and fifth rib. The margin of wound was irregular and inverted. Both wounds were communicating and intervening portion of left lung was lacerated.

Injury No. (iii) Entry wound $\frac{1}{2}$ ” x $\frac{1}{2}$ ” x chest cavity deep at right lateral chest wall one inch below posterior auxiliary fold in the 4th space with irregular inverted margin and fracture and dislocation of the portions of 3rd and 4th rib. Tattooing around wound of entry in an area of 3” diameter was found.

Injury no. (iv)- Exit wound $\frac{1}{2}$ ” x $\frac{1}{2}$ ” x chest cavity deep at the level of lower border of T-11 vertebra at the back $\frac{1}{4}$ ” right of T-11 vertebra with fracture and outward dislocation of underline rib.



Injury no. (iii) and (iv) were communicating and intervening portion of right lung was lacerated. Chest cavity contained dark blood and blood clots.

Age of wound- within 12 hours.

Time since death:- With 24 hours.

Cause of death:- Shock and hemorrhage by injuries to chest by fire arms.”

He has proved the post mortem report authored by him and bearing his signature (Ext.-5). We have also the benefit of the inquest report drawn on 20.04.2010 by the Officer-in-charge in presence of P.Ws.-1 and 2, the two close relatives of the deceased wherein he noted the deceased had received gun shot injuries. It has not been argued before us that the Investigating Officer did not reach the Emergency Ward of the hospital and completed the death inquest proceeding on 20.04.2010 at 7 a.m. Seen thus, it is established that the deceased was done to death by means of gun shot injuries on the relevant date and time of occurrence.

6. According to the prosecution case disclosed in the fardbeyan (Ext.-2) and further unfolded at the trial, the place of occurrence is the roof top of the house of the deceased where he was sleeping with his family members including his wife (P.W.-3). The evidence of the witnesses on this point clearly go to prove that the deceased was done to death at his roof top. The Investigating Officer (P.W.-8) has deposed that upon registering the case, he went to the village in



question and inspected the place of occurrence which is the roof top of the house of the informant (P.W.-3). He could notice blood stained marks on the roof top. He also found and seized two empty shells of the cartridges of .315 bore under a seizure memo (Ext.4). A cloth containing blood marks was also seized by him from the said roof top. The place of occurrence being the roof top of the house of the informant (P.W.-3) is clearly established.

7. The crucial point for our consideration is whether the prosecution has been able to prove the manner of occurrence and the complicity of the appellant in the crime. These are the two points on which submissions have been advanced on behalf of the appellant. It has been argued by Mr. Sinha that the prosecution has failed to discharge its onus with reliable evidence. It is submitted that P.W.-3 is the only eye witness to the occurrence. Pinki Devi who was sleeping on the adjoining roof top on the relevant night and is said to have received fire arm injury at the hands of the culprits has not claimed identification of any of the accused and named the appellant in her deposition. She failed to identify the appellant in the dock whereafter, at the request of the prosecution, she was declared hostile. The other witnesses are hearsay and have definitely not claimed as a witness to the actual assault on the deceased by the accused. P.W.- 1 Rajesh Chaudhary being full brother of the deceased and P.W.-3 Surendra



Chaudhary being own nephew of the deceased, however, in their examinations-in-chief have stated that on hearing the sound of three gun shots, they rushed to the house of the informant and saw the appellant leaving towards east from the door of the house of the informant. These witnesses, he submits, had not stated so in their respective C.D. statements recorded by the Investigating Officer immediately after the occurrence. In this connection, our attention is drawn to the relevant part of the deposition of P.Ws.1 and 2 and the evidence of the I.O (P.W.-8). where he has testified that these two witnesses had not claimed before him to have seen the appellant fleeing away from the door of the house of the informant when they rushed to the place of occurrence. It is also pointed out from their evidence that when they reached the roof top after the incident had already taken place, they could see many but not the informant. Thus, this is a case where the name of the assailant of the deceased was not known to any of the witness until recording of the F.I.R. on the following morning at about 6.45 a.m.. It is seen from the record that the appellant is also resident of the same village. From the testimony of the Investigating Officer, it would reveal that he received an information about the killing of the deceased at the hands of the appellant but the said information was not reduced in writing and produced before the Court. In fact, the aforesaid information received



by the Investigating Officer should have been treated as the First Information Report which was not done by him. Although, it is not necessary for the prosecution to prove the motive but in the case at hand, through the evidence of P.W.-1 (vide paragraph 2), it has been alleged that a week before the occurrence, the appellant had come to the shop of the deceased and demanded one bottle of *mahua* wine which was denied whereafter the appellant had abused and held out threats to him. It is submitted that it is too trivial a motive which could have aggravated the appellant to commit the murder of the appellant at the dead of night while he was sleeping on the roof top. The manner of occurrence has also not been proved. The evidence of P.W.-3 (informant) on which the prosecution has heavily relied suffers from several contradictions. She has made several improvements in the case in order to align the prosecution case with the objective findings of the doctor. He would thus argue that the prosecution has failed to establish the manner of occurrence as well as the complicity of the appellant in the crime beyond reasonable doubts.

8. In contra, learned APP has submitted that the prosecution has proved the case. P.W.-3 has narrated the manner of occurrence and the implication of the appellant in the crime being the accused who shot three times at the deceased resulting in his death. Her evidence finds support from the testimony of P.Ws. 1, 2, 4, 5, 7 and 11. It has been



argued that the Court would be justified in recording conviction on the strength of singular eye witness if his or her evidence inspires confidence of the Court and is found completely reliable. In such case, the Court can, to some extent, overlook the opinion of the doctor based on his objective findings in the post mortem report.

9. In the light of submissions of the parties, we would first examine the evidence of the P.W.-3 (informant). In her fardbeyan (Ext.-3), she has stated that while she was sleeping at the roof top with her husband at about 12 p.m. in the midnight, the appellant and others appeared on the roof top and removed the *chadar* (cover) and after identifying her husband, he fired on his chest, back and below the shoulder. When Pinki Devi tried to raise alarm, she too was fired at causing injury on her head. Thereafter, the accused persons took the staircase of the house and escaped from the main door after breaking open the lock put on the door. In her deposition in Court, it is stated that the deceased was then sleeping on a *chatai* and the rags (*gendra*). All of them were sleeping on the mat and the *gendra*. On one side of the deceased, she was sleeping whereas the children were sleeping on the other side. The defence has drawn a contradiction by drawing her attention to the statement before the I.O. (P.W.-8) where she has stated that her husband was first abused, slapped and fisted. In paragraph 6, she has made further improvement in the prosecution



case when she says that the appellant had fired at the deceased when the deceased was standing. The blood oozed out from the injuries wet her cloth and the bed on which they were sleeping. The I.O. had seen the blood stained *gendra* and also the broken locks. Turning to the evidence of the I.O. (P.W.-8), we find that he had not seen the blood stain *gendra* on the roof top or the broken lock of the main door or any mark of violence on the door to show that force was applied to break open the lock. Adverting to the evidence of the doctor (P.W.-9) and the post mortem report (Ext.5), it is seen that altogether four injuries were found on the person of the deceased caused by fire arm. Injury no. (i) at the chest and injury no. (ii) at left side of back at scapular region were the wound of entry and exit. Injury no. (iii) at right lateral chest wall went below the posterior auxiliary fold in the 4th space and injury no. (iv) found at the level of lower back of the vertebra were again found the wound of entry and exit respectively. It has been argued that one of the injuries, sustained by the deceased, was not possible while he was sleeping. For this reason, P.W.-3, in her deposition, developed the prosecution case to match with the objective findings and opinion of the doctor in the post mortem report. This witness is specific in alleging that three shots were fired which, however, does not find corroboration from the evidence of P.W.-1 who is full brother of the deceased as also the objective finding of the



doctor. The third firing might have been used to assault another witness but, on appreciation of evidence, the Trial Court found no sufficient evidence and acquitted the appellant of the charge under Section 307 IPC for voluntarily causing injury to Pinki Devi (P.W.-7). What is more intriguing is that P.W.-4, who was brought by the father of the deceased (P.W.-6) to carry the injureds to the hospital has not disclosed the name of the assailant. P.W.-4 has stated that he resides only 200 yards away from the house of the deceased. P.W.-6 (father) had come to his house at the dead of night and said that his son had received gun shot injury and he should come with his auto rickshaw to carry the injured to the hospital. It is, thus, evident that the prosecution knew well P.W.-4 who was a co-villager. It was natural on the part of a witness who had gone at the dead of night to the witness to request for his help stating that his son had received gun shot injuries to name the accused also, who too belonged to the same village. This lends support to the arguments advanced on behalf of the appellant that until lodging of the F.I.R. in the morning, nobody knew the name of the assailant. To fill up these lacunae, P.Ws.-1 and 2, in course of their evidence, stated that when they rushed to the house of the deceased, they could see the appellant leaving from the main door of the said house. We have perused the evidence of the I.O. (P.W.-8) at paragraph 9 where he has clearly stated that these witnesses had not



claimed before him about having seen the appellant at the dead of night leaving from the main door of the house of the deceased. We have also carefully perused the evidence of P.Ws.-1 and 2. They have not whispered about either meeting with or presence of the informant in the house or at the roof top of the house. For these reasons, P.W.-6, who was later examined, has stated in his examination-in-chief that when he reached the roof top, after hearing the sound of gun shot, he could see the informant present there and P.W.-3 disclosed to him that it was the appellant who had fired and caused injury to the victim/deceased. In order to verify as to whether the witness had claimed so before the I.O., we turn to the evidence of I.O. (Pramod Kumar Singh) and find from paragraph 8 of his deposition that this witness had not claimed so before the I.O.

10. P.Ws.-7 and 11 are distant relatives of the informant. All other witnesses produced by the prosecution are closely related to the informant. The informant has admitted the *inter se* relationship with those witnesses in her deposition. We have thus perused the evidence of P.W.-7. She has flatly refused to identify and name the appellant. This witness has stated that she was sleeping very close to the victim but could not identify the assailant as it was a dark night. P.W.-11 is father of P.W.-7. He too claims to be present at the roof top during the relevant time of occurrence. On hearing the gun shot, he woke up and



fled to village and raised *hulla* that dacoits had attacked the house whereafter several villagers came to the place of occurrence and went up to the roof top and saw the victim yelling having received gun shot injury whereafter with the help of P.W.-4, the injured as well as the victim/deceased were carried to the hospital where the husband of the informant died. Apart from him, other prosecution witness have also stated about the immediate presence of several co-villager, although, after the assault.

11. As seen, the evidence of sole eye witness P.W.-3 (informant) suffers from the vice of purposeful improvement, the Court would look to the corroboration of the prosecution case from independent source, particularly, when some witness have stated about presence of several co-villagers at the roof top albeit after the assault. Unfortunately, none has been examined except P.W.-4 who is a co-villager and known to the family of the informant from before. He is the person whom the father of the deceased had gone at the dead of night with a request to provide transportation (auto rickshaw) to carry the injureds to the hospital which he did. We have carefully read his evidence. He has not deposed that the father of the deceased disclosed the name of the assailant who was also a co-villager although he had disclosed to him that his son had received gun shot injury and required urgent help. The natural human conduct of the



father of the deceased was to disclose the name of the accused who was his co-villager if it was known to him through the informant (P.W.-3) whom he had professedly met at the place of occurrence.

12. Even on the sole testimony of one eye witness, the conviction can be fastened on the accused. In the case at hand, it is the wife of the deceased but the evidence of such solitary eye witness should inspire the confidence of the Court and held completely above board. In the case in hand, the evidence of the solitary eye witness (P.W.-3) falls short on many counts as discussed above. During trial, she has materially changed the manner of assault. Her testimony does not find full support from the findings of the doctor on the injuries sustained by the deceased. P.W.-7 is an agnate of the informant. She has not claimed identification of the culprit as it was a dark night. Her father (P.W.-11), in his deposition, has stated that on hearing the sounds of firings, he ran down from the roof top and raised a *hulla* that dacoits had come and attacked.

13. What was the motive of the occurrence? The prosecution has alleged that few weeks earlier, the appellant had come to the shop of the deceased and demanded *mahua* wine which was refused. This had irritated the appellant. We find substance in the submission of the defence that it was too trivial a motive for the accused to commit such offence without taking any precaution to conceal his identity.



Considering thus, we do not find it safe to convict the appellant on the strength of the evidence on record. The appellant is entitled to the benefit of doubt and it is held that the prosecution has failed to prove the complicity of the appellant in the crime beyond shadow of reasonable doubts.

14. Consequently, the appeal succeeds. The judgment of conviction dated 14th May, 2013 and the order of sentence dated 22.5.2013 passed by learned Additional Sessions Judge-I-cum-Special Judge, Gaya in SC/ST Trial No. 01 of 2011 is set aside. He shall be set at liberty if not required in any other case.

(Kishore Kumar Mandal, J)

Sanjay Kumar, J : I agree.

(Sanjay Kumar, J)

Pankaj/-

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