

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.60 of 2014

Arising Out of PS.Case No. -147 Year- 1993 Thana -WARSALIGANJ District- NAWADA

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1. Ajay Kumar Tiwari Son Of Late Dhobi Singh Resident Of Village- Apsharh,
Police Station- Warisaliganj, District- Nawada

.... Appellant/s

Versus

1. The State Of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ajay Kumar Thakur
Mr. Imteyaz Ahmad Advocates.
For the Respondent/s : Mr. S. N. Prasad, APP

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL
and
HONOURABLE MR. JUSTICE MADHURESH PRASAD
CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)

Date: 02-08-2017

The sole appellant has challenged the judgment of his conviction dated 28.11.2013 under Section 302/34 of the IPC and Section 27 of the Arms Act recorded by the learned *Ad hoc* Additional Sessions Judge III, Nawada in Sessions Trial No. 34/94/77/2008 and the order of sentence dated 28.11.2013 inflicting punishment to suffer R.I. for life under Section 302/34 of the IPC and R.I. for 03 years with imposition of fine having default clause under Section 27 of the Arms Act.

2. Filtering unnecessary details, the prosecution case set out in the '*Fardbeyan*' (Ext. 2) lodged by Santu Singh (PW1) on 15.10.1993 at 1.15 P.M. and recorded by the Asstt. Sub Inspector of



Police, Warsaliganj P.S., in brief, is what while he was watching his paddy field situated at 'Tarauna Bandh' where his cousin nephew Pawan Singh (deceased) was also cutting grass on the ridge of the field, at about 9 AM the appellant along with other co-accused(s) appeared from the adjoining sugarcane field armed with rifle, double barrel gun, country made pistol and a bag containing bombs. Co-accused Arun Singh exhorted his associates to kill Pawan Singh whereafter co-accused Shankar Singh fired from his rifle which hit the deceased in his back. The injured even after receiving the injury ran some distance and fell in the adjoining paddy field, when all the accused persons including the appellant chased and surrounded him. Co-accused Bom Singh fired from his gun upon his head from a point blank range which blew off his skull. Thereafter the appellant also fired from the rifle on the deceased from a close range. Co-accused Bochu Singh is also said to have fired from his rifle on the deceased. As a result of these injuries, the deceased died at the spot instantaneously .

3. Recording of the 'Fardbeyan' ignited the investigation wherein the police conducted the inquest proceeding over the dead body on the place of occurrence itself on 15.10.1993 at 1.30 pm in presence of Shashi Bhushan Singh(PW9) and Chandra Bhushan Singh. The dead body was dispatched for post mortem. PW-8 who



was then posted at the Sadar Hospital, Nawada held the autopsy on 16.10.1993 at 8.30 AM and furnished the post mortem report (Ext.3). The statement of the witnesses were recorded. PW-2 took over as the Investigating Officer of the case and on the basis of the materials collected by the previous I.O. laid the charge sheet against the appellant whereon cognizance was taken on 12.07.1994 and the case was committed to the Court of Sessions on 02.08.1994. The trial of the case was assigned to the learned Trial Court where charges were framed and read over to the appellant to which he pleaded not guilty. The defence case as it appears from the trend of cross-examination of the prosecution witnesses is that the accused was falsely implicated in the case due to village rivalry and that the deceased Pawan Kumar Singh was having criminal antecedents and obviously he had several enemies. He was killed by his enemy at a different place and in different manner. His implication is false.

4. In order to bring home the guilt of the appellant, the prosecution examined 11 witnesses. After conclusion of the prosecution witnesses, the statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure wherein he denied to have gone to the place of occurrence armed with a rifle. He again pleaded his false implication in the case.

5. PW-1 Sahdeo Singh has taken the dock to support the



prosecution case as an eye-witness. The prosecution has presented PW-1 Sahdeo Singh, PW3 Ramsagar Singh, PW4 Brijkishor Singh, PW5 Sachidanand Singh, PW6 Arvind Singh and PW7 Santu Singh (informant) as eye witnesses. PW-2 had taken over the investigation from another Investigating Officer (for short 'the I.O.') and laid the charge sheet against the appellant. PW8 Dr. Suniti Kumar was then posted at Sadar Hospital, Nawada. On 16.10.1993 at 8.30 A.M., he held post mortem on the cadaver of the deceased duly identified by the police constable Ambika Singh and chowkidar Chaman Paswan. The post mortem report furnished by the Autopsy Surgeon is Ext.3. PW-9 Shashi Bhusan Singh is a witness to the inquest report and proved his signature Ext. ½. In his examination-in-chief, he has also stated about the place of occurrence where the dead body was lying and also presence of blood near the dead body. PW10 Mosadeo Singh is the A.S.I. and Malkhana incharge who produced empty cartridge (material Ext I), live cartridge .315 bore (material Ext. II) and blood stained soil collected from the place of occurrence (material Ext. III). PW-11 Sanjay Kumar was not relied upon by the appellant and was declared hostile.

On an appraisal of the evidence of the prosecution adduced at the trial, the Trial Court held him guilty of the charge/offence and sentenced him in the manner noted above.



6. Heard Mr. A.K. Thakur for the appellant and Mr. S.N.Prasad APP for the State.

7. Before we deal with the rival contention(s), it is profitable to first examine the evidence of the Doctor. PW-8 held the autopsy and proved the post mortem report (Ext. 3). The doctor found the following ante mortem injuries on the dead body:-

“(I) Lacerate wound over occipital region back in mid line of size 1 ½”x 1” x skull cavity deep, margin was inverted and blackened (it is wound of entry)

(II) Lacerated wound over right side of skull of size 8”x6”x skull cavity deep. Margin was inverted. (Wound of exit)

Both injury no. (1) & (II) were in a back and brain matters coming out through both injuries.

Injury No. (iii) lacerated wound of size ½” x 1 ½” x muscle deep over right elbow joint posterior aspect. Margin inverted and blackened (wound of entry)

Injury no. (iv) lacerated wound over medial aspect of arm of three inches above elbow of size 1” x ½” x muscle deep. Margin inverted (wound of exit.) both injuries no (iii) and (iv) found in a back.

Injury no (v) lacerated wound over right side chest five inches below auxiliary line and three inches from breast of size 1” x ¾” x chest cavity deep.. Margin was inverted and blackened (wound of entry).

Injury no. (vi) lacerated wound of size 1/3” x 1/3” x muscle deep two inches from mid line posteriorly right side back at the level of first lumbar vertebra. Margin was inverted. (wound of exit).

On dissection right side chest cavity was full of blood. Right lung found lacerated. Both injuries



no. (v) and (vi) were found in a back. Heart was found empty both side. Stomach was empty. All viscera pale. Bladder was empty. Time elapsed since death was within 12 to 36 hours approximately. Cause of death was above mentioned injuries. Nature of weapon was firearm. Injury no. (1) and (11) may be caused by double barrel gun. Injury no. (III) (IV), (V) and (VI) may be caused by rifle.”

It has not been disputed before us that the death of the deceased was homicidal in nature which resulted due to the three fire arm injuries inflicted on him.

8. On behalf of the appellant Mr. Thakur has contended, inter alia, this is a case where the manner of occurrence, the place of occurrence and the time of occurrence have not firmly been established by the prosecution. The evidence, brought on these points, are not corroborated from the medical evidence of the doctor (PW8) and his findings in the post mortem report (Ext. 3). He further submits that, surprisingly, the inquest report (Ext.1/2) and the post mortem report (Ext.3) details the registration of the case number and the date. The occurrence, according to the prosecution, was committed at 9 A.M. in the morning. The inquest report does not set out the date and time of the inquest proceeding. It only details the case Number which was later registered on the ‘*fardbeyan*’ of the informant. The post mortem report, similarly set out the case Number which was registered at Warsaliganj police station on 15.10.1993 at 18:00 hours.



He has placed before us the evidence of PWs 1, 3, 4, 5, 6 and 7 and drew the attention of the Court to the relevant paragraphs of their deposition(s) where attention was drawn to their previous statement(s) made under Section 161 of the Cr. P.C.. He submits that non-examination of the I.O. has caused serious prejudice to the defence. To support the contention he has relied on the case of **Lahu Kamlakar Patil & Anr. vs. State of Maharashtra [2013(6) SCC 417]**. It has further been submitted that almost all the eye witnesses have consistently spoken about the first assault made on the deceased while he was grazing grass on the ridge of the field which hit him in his back whereafter he ran to some distance and fell down whereafter the accused(s) including the appellant had assaulted. PW1 has stated about 06 shots of fire hitting the deceased whereas PW3 has stated about 04 fire arm injuries caused to the deceased at the hands of the appellant and other co-accuseds. The post mortem report contradicts their evidence. The time of occurrence spoken by these witnesses also do not get support from the evidence of the Doctor. Lastly, he has submitted, referring to Ext. A, which is certified copy of the judgment rendered subsequently by the Trial Court in respect of other co-accused(s) that on appreciation of evidence of present set of witnesses produced therein, the Court did not find them cogent and reliable and they were acquitted.



9. Learned APP, conversely, supported the prosecution case. He submits that non-examination of the I.O. will not invariably result in causing serious prejudice to the defence. If the ocular evidence is cogent and reliable the Court can always rely on their evidence. It is further submitted that PWs 1, 3, 4, 5, 6 and 7, in their respective examination(s)-in-chief, have fully supported the prosecution case and the complicity of the appellant in the crime. The prosecution has been able to prove the genesis of the occurrence, the place of occurrence and the manner of occurrence which led to the conclusion arrived by the Trial Court.

10. On close perusal of the evidence on record, it is more than explicit that the consistent case of the prosecution is that the deceased was at the ridge of the field engaged in cutting the grass when the appellant and other accused persons emerged from the nearby sugarcane field and at the orders of one of the co-accused he was shot with a rifle by one of the co accused(s) which hit him in his back whereafter he run some distance before he fell down. We also find from their evidence that the deceased was having criminal antecedents. PWs- 1 and 7 have specifically spoken about it. Suggestion to other witness was given by the defence. What distinctly appear from their evidence is that on the ridge of the field the first assault was made on the deceased and in the nearby field he was



assaulted by the accused including the appellant when he fell in the field on receiving the first assault at the ridge of the field. One of the co-accused(s) assaulted him in his head whereafter the appellant is alleged to have assaulted with fire arm on his chest. Another co-accused also assaulted him on his arm. It has been urged before us by the defence counsel that except PW-7 no one had stated about the assault by the appellant to the deceased by fire arm in their respective C.D. statement(s). Our attention has been drawn to the relevant part of their evidence where the defence suggested to this effect.

11. Our attention is also drawn to the relevant suggestion(s) given to all prosecution witnesses with respect to the first place of occurrence the sickle with which the deceased had gone to the field and the ridge. It was stated by some of them that they were shown to the I.O. Referring to their evidence on this aspect, it has been argued that the non-examination of the I.O. has caused serious prejudice to the defence as from the suggestion given to the witnesses it would appear that it was not so stated or shown by them in course of investigation to the I.O..

12. Adverting to the findings of the doctor in the post mortem report it is found 03 wounds of entry caused by fire arm were found on the cadaver. Injury nos. (I) and (II) were communicating to each other. Injury nos. (III) and (IV) are again the



wounds of entry and exit. The doctor found them in one impact. In other words, they were communicating to each other. Injury no. (V) found over right side of chest was communicating with injury no. (VI) which was wound of exit. The doctor found rigor mortis present only over lower limbs and sign of decomposition had set in. In para 12 of the deposition of the doctor, it is stated that the deceased might have died before 02 to 03 AM on 14.10.1993 as the decomposition had set in. The another important finding of the doctor is that the stomach and the urinary bladder of the deceased were found empty. According to the case of the prosecution, the occurrence had taken place at 9 o'clock in the morning at the field. What is clearly evident from the evidence of the eye witnesses and the evidence of the Doctor is that the time when the deceased was done to death sharply differs. It has been contended, and rightly so, that the doctor found the process of decomposition set in which generally happens if the body is kept more than 30 or 32 hours. To add to it, the time of occurrence is 9 AM. The deceased was engaged in agricultural operation(s). He was cutting grass. It is a matter of common knowledge that people in the village go for work in the field in the morning only after taking breakfast. The objective finding of the doctor on the emptiness of the stomach give credence to the case of the defence that the deceased was done to death well before the time as suggested by the



prosecution. We also find from the trend of cross-examination of the witnesses that a suggestion was given to almost all the prosecution witnesses that the deceased having a criminal background was done to death at a different place and on a different time. If the evidence of the doctor is given credence then the defence has a case to stand on this point.

13. In order to ascertain the place of occurrence as spelt out by the prosecution we perused the inquest report keeping in view the evidence of PW 7 (informant) and many of the witnesses that the deceased was lying after having received the assault was in a paddy field full of mud/water. It is not evident from the inquest report (Ext.1/2) that the deceased was found clad in cloth smeared with water or mud. The doctor has also not stated so. That apart, the contention of the defence is that an information was received earlier in the point of time regarding the death whereon a case was registered and, therefore, the I.O. inserted the case number in the inquest report prepared by him at the spot and consequently the doctor in his post mortem report (Ext. 3). The evidence on this point is not very specific. However, at least a doubt is created on the veracity of the prosecution case.

14. In **Lahu Kamlakar Patil (supra)** the Hon'ble Apex Court having examined the evidence on record, in para 18 held as



under:-

18. Keeping in view the aforesaid position of law, the testimony of PW 1 has to be appreciated. He has admitted his signature in the F.I.R. but has given the excuse that it was taken on a blank paper. The same could have been clarified by the investigating officer, but for some reason, the investigating officer has not been examined by the prosecution. It is an accepted principle that non-examination of the investigating officer is not fatal to the prosecution case. In *Behari Prasad v. State of Bihar*, this Court has stated that non-examination of the investigating officer is not fatal to the prosecution case, especially, when no prejudice is likely to be suffered by the accused. In *Bahadur Naik v. State of Bihar*, it has been opined that when no material contradictions have been brought out, then non-examination of the investigating officer as a witness for the prosecution is of no consequence and under such circumstances, no prejudice is caused to the accused. It is worthy to note that neither the trial judge nor the High Court has delved into the issue of non-examination of the investigating officer. On a perusal of the entire material brought on record, we find that no explanation has been offered. The present case is one where we are inclined to think so especially when the informant has stated that the signature was taken while he was in a drunken state, the panch witness had turned hostile and some of the evidence adduced in the court did not find place in the statement recorded Under Section [161](#) of the Code. Thus, this Court in *Arvind Singh v. State of Bihar*, *Rattanlal v. State of J&K* and *Ravishwar Manjhi v. State of Jharkhand*, has explained certain circumstances where the examination of investigating officer becomes vital. We are disposed to think that the present case is one where the investigating officer should have been examined and his non-examination creates a lacuna in the case of the prosecution.

15. What is concluded on the point is that if veracity of the several statements of the witness remained untested and that where no independent objective findings regarding the occurrence supporting the prosecution case, the non-examination of the I.O. would be considered as severely prejudicial to the defence. It has



been argued before us by the defence that in Court almost all witnesses have stated about the assault on the back received by the deceased which has been contradicted by the objective finding of the doctor. Many of the witnesses had not stated about their presence at the place of occurrence and witnessing each and every detail of the events taking place there before the I.O. They had narrated a different story of having seen the appellant escaping from the place of occurrence after the assault. For this reasons suggestions to all witnesses were given by the defence. In such circumstances, the withholding of the I.O. for no plausible reason has taken away a valuable right of the defence to place the material contradiction(s) in the evidence of the PWs. Only PW 7 who is author of the '*fardbeyan*' had stated about fire by the appellant on the deceased. This witness, in Court, has also perceptibly improved his version and stated that the firing made by the appellant had hit the chest of the deceased.

16. One of the contentions of the appellant is that there was no justification for these PWs who belonged to one family to be present in the particular '*Bahiyar*' as they had no land. PW-7 has stated that he had gone to the field to watch his paddy crop when confronted he said that he would produce document that he had the land in the said '*Bahiyar*' which was not produced. In our view, this cannot be treated as a material defect in the prosecution case. PW-1



has stated about going to the field to watch paddy crop. He has, however, not stated that the paddy crop was grown on his land. We do not find much force in the contention.

17. The distinct finding of the doctor not finding a wound of entry of the bullet in the back of the deceased makes the prosecution case as projected by the witnesses more vulnerable. It is the positive case that he was struck on his back by a rifle shot while standing on the ridge in the field whereafter he run to some distance. The post mortem report overrules the said injury. A serious doubt is created on the prosecution case.

18. Ext. A is the judgment of acquittal of other co-accused(s) of the present case rendered by the learned Trial Court in a separate trial. The present set of prosecution witness had deposed in the said case. The Trial Court did not find their evidence trustworthy and acquitted the co accused(s). Although the Court is not required to take into account the reasonings of the Trial Court for acquitting the co-accused(s) in different trial, but, in the facts of the case, the same gives credence to our view in the present case for not placing reliance on the relevant depositions of PWs for the reasons noted above. It may also be stated that the hostility between the parties is reflected from the record. The possibility of the false implication of the appellant cannot be completely ruled out. The medical evidence



sharply contradicts the prosecution case both on the manner of occurrence as well as the time of occurrence. We do not find it safe to convict the appellant. He is entitled to be given the benefit of doubt.

19. For the reasons aforesaid, the appeal is allowed. The impugned judgment and order of conviction recorded against the appellant are set aside. The appellant shall be set at liberty forthwith if not required in any other case.

(Kishore Kumar Mandal, J)

I agree.

(Madhuresh Prasad, J)

Shyam/-

AFR/NAFR	NAFR
CAV DATE	14.07.2017
Uploading Date	02.08.2017
Transmission Date	02.08.2017

