

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.312 of 2002

Arising Out of PS.Case No. -null Year- null Thana -null District- SITAMARHI

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1. Bindeshwar Kapar @ Bigu Kapar, Son of Harishchandra Kapar
 2. Sri Naraian Kapar, Son of Shri Bindeshwar Kapar @ Bigu Kapar.
 3. Rampat Mahto, Son of Late Dasai Mahto, All residents of village – Maniari, P.S.- Sitamarhi, District-Sitamarhi.
- All are resident of village – Maniari, P.S.-Sitamarhi, District-Sitamarhi.

.... Appellants

Versus

State of Bihar

.... Respondent

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Appearance:

For the Appellant/s : Mr. Ajay Kumar Thakur, Advocate.
Mr. Pushpendra Kumar Singh, Advocate.
For the State : Mr. Bipin Kumar, APP.

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CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL
ORAL JUDGMENT
Date: 09-10-2017

Heard learned counsel for the appellants as well as learned APP for the State.

2. This criminal appeal has been preferred against the Judgment and Order of conviction and sentence dated 30.05.2002 passed by the Fast Track Court-I, Sitamarhi in Sessions Trial No. 74 of 1998 / 26 of 2001 arising out of Sitamarhi P.S. Case No. 191 of 1996, whereby the learned trial court convicted Bindeshwar Kapar @ Bigu Kapar, Sri Naraian Kapar and Rampat Mahto for the offence punishable under Section 304 Part-II of the Indian Penal Code and sentenced them to undergo R.I. for ten years each under the said



Section.

3. The factual matrix of the case is that Sitamarhi P.S. Case no. 191 of 1996 was instituted under Section 302/34 of the Indian Penal Code against the accused persons, namely, Bindeshwar Kapar @ Bigu Kapar, Sri Naraian Kapar and Rampat Mahto on the basis of the fardbeyan of Sanjhariya Devi, Wife of Late Bhola Ram, Resident of Village-Maniari, P.S. + District- Sitamarhi recorded by S.I. Uttam Singh of P.S. Sitamarhi on 16.07.1996 at 07:00 hrs at village Maniari with the allegation in succinct that her son Ram Babu Ram used to work as a ploughman of Bindeshwar Kapar. The said Bindeshwar Kapar @ Bigu Kapar used to pay less wages to him that is why he left ploughing his field 8 days prior to the occurrence. Bindeshwar Kapar and his son Shri Naraian Kapar had entered into quarrel with him and extended threatening over the same. Further allegation is that in the past night at 10-11 PM, the bull of Bigu Kapar was untied, her son caught hold the said bull to tie the bull in the peg of Bigu Kapar. In the meantime, Bigu Kapar and his son Shri Narain Kapar made halla that some thief is untying his bull and started assaulting him. Rampat Mahto also arrived there and all the accused persons brutally assaulted him. In the meantime, 100 of villagers congregated there and all of them assaulted her son by means of leg, fist and brickbat etc. and made him injured and he



succumbed to his injury. Rampat Mahto also lodged a false case of theft against him. She and her daughter-in-law rushed in his rescue, but in vain. It is claimed by the informant that Bigu Kapar and his son Shri Naraian Kapar and Rampat Mahto along with the villagers thrashed her son to death by assaulting him by means of lathi, danda and leg over the previous animosity.

4. The aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted chargesheet against the accused persons, namely, Bindeshwar Kapar @ Bigu Kapar, Sri Naraian Kapar and Rampat Mahto under Section 304 of the Indian Penal Code.

5. On receiving the chargesheet and the case diary and perusing the same, the learned Magistrate took cognizance of the offence against the accused persons and committed the case to the court of sessions and on transfer finally the case came in *seisin* of the Fast Track Court-I, Sitamarhi for trial.

6. Charge against the aforesaid accused persons was framed under Section 302 of the Indian Penal Code. Charge was read over and explained to them to which they pleaded not guilty and claimed to be tried.

7. To substantiate its case, in ocular evidence, the prosecution has examined altogether five prosecution witnesses



namely, Guru Dayal Sah as PW-1, Etwariya Devi as PW-2, informant Sanjhariya Devi as PW-3, I.O. Uttam Singh as PW-4 and Nagendra Yadav as PW-5. Out of the aforesaid witnesses, PW-5 happens to be the formal witness who has proved the post mortem report marked as Exhibit-4. In documentary evidence, the prosecution has filed and proved several documents.

8. The statement of the accused persons was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence claiming themselves to be innocent. In buttress of their case, in ocular evidence the accused persons have examined two witnesses, namely, Dasrath Mahto as DW-1 and Shyamdhari Mahto as DW-2. In documentary evidence, they have filed and proved several documents.

9. After hearing the parties and perusing the record, the learned trial court passed the impugned Judgment and Order of conviction and sentence as detailed in the earlier paragraph.

10. Being aggrieved and dissatisfied with the aforesaid Judgment and Order of conviction and sentence, the convicts have preferred the present Criminal Appeal.

11. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charge levelled against the appellants beyond all reasonable doubts or not.



12. It is submitted by learned counsel for the appellants that there is no eye witness of the occurrence. PW-2 Atwariya Devi and PW-3 Sanjhariya Devi happen to be the sister-in-law and mother of the deceased respectively and they are highly interested witnesses of the case and there is vital contradiction between their statements recorded before the Court and that recorded before the I.O. under Section 161 of the Code of Criminal Procedure. In view of the aforesaid contradiction, the testimony of the aforesaid witnesses are not worth credence and reliable. It is further submitted that PW-2, PW-3 (informant) and PW-4 (I.O.) have stated that the chaukidar had given information of the occurrence to the police station but he had not disclosed the name of the appellants in the earlier disclosure of the occurrence rather the I.O. has stated in his examination-in-chief that he got information by chaukidar that the thief was caught at the place of occurrence and he has died due to thrashing. The son of the informant, namely, Pachu Ram who had accompanied the chaukidar to the police station has also not been examined by the prosecution rather withheld by it. The doctor conducting the autopsy of the dead body of the deceased has not been examined by the prosecution and the post mortem report has been proved by a formal witness who is neither acquainted with the signature and handwriting of the said doctor nor has worked with him and he has no knowledge of medical



science, hence, the post mortem report has not been legally brought on the record and it is not admissible in evidence. So the ocular evidence of the prosecution also does not stand corroborated by the medical evidence. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case by adducing consistent, trustworthy, reliable ocular and documentary evidence. Hence, the appellants are entitled to get the benefit of doubt.

13. On the other hand, learned APP advocating the correctness and validity of the impugned Judgment and Order of conviction and sentence, submitted that though PW-1 does not happen to be the eye witness of the occurrence, but rest two material witnesses, namely, Atwariya Devi (PW-2) and Sanjhariya Devi (PW-3) have supported the occurrence of assaulting the deceased by the appellants by means of lathi, brickbat, fist, etc. resulting into his death. The aforesaid ocular evidence also stands corroborated by the medical evidence and the learned lower court correctly appreciating the facts and evidence available on record has rightly passed the impugned Judgment and Order of conviction and sentence which is liable to be upheld and this appeal has no substance in it and is liable to be dismissed.

14. From perusal of the record, it appears that three material witnesses have been examined by the prosecution to



substantiate its case. Out of them, PW-1 does not happen to be the eye witness of the occurrence as PW-1, namely, Guru Dayal Sah has stated in his examination-in-chief itself that when he arrived at the place of occurrence at 04:30-04:45 AM, he witnessed Ram Babu Ram dead there. PW-2, namely, Atwariya Devi who happens to be the sister-in-law of the deceased and daughter-in-law of the informant and PW-3, namely, Sanjhariya Devi, who happens to be the mother of the deceased appear to have made an abortive bid to support the prosecution case by stating in their respective examination-in-chief that on the date and time of occurrence, they were at the house. There was a halla at the door of Rampat Mahto and Bigu Kapar. Responding the same, they along with Pachu Ram rushed there and witnessed Bindeshwar Kapar, Sri Naraian Kapar, Shyamnandan Kapar, Rampat Mahto, Shivjee Mahto and Suresh Kapar assaulting Ram Babu Ram. Bindeshwar Kapar assaulted him by means of lathi, Shyamnandan Kapar, Shivjee Mahto and Sri Naraian Kapar by means of brickbat, Suresh Kapar by means of dagger and Rampat Mahto by means of leg. They rushed in his rescue but in vain.

15. But from perusal of Para-7 of the cross-examination of PW-2 and Para-6 of the cross-examination of PW-3, it appears that the defence has drawn attention of the aforesaid



witnesses towards contradiction between their statements recorded before the Court and that recorded before the I.O. under Section 161 of the Code of Criminal Procedure regarding the occurrence, manner of occurrence, assault, assailant, etc. From perusal of the aforesaid contradiction, it appears that the said witnesses have given altogether contradictory statement regarding aforesaid aspect of the case before the court and that before the I.O. The I.O. examined in this case as PW-4 in Para-6 and Para-7 of his cross-examination has corroborated the aforesaid contradiction between the statements of the aforesaid witnesses given before the Court and that given before him regarding the aforesaid aspect of the case. The aforesaid witnesses appear to have taken altogether different stand in the court claiming themselves to be eye witnesses of the occurrence but in their respective statements recorded under Section 161 of the Code of Criminal Procedure, they have not stated about witnessing the occurrence of assault, etc. before the I.O.

16. PW-2 Atwariya Devi and PW-3 Sanjhariya Devi happen to be the highly interested witnesses of the case being sister-in-law and mother of the deceased respectively. It is the settled principle of law that the testimony of the interested witnesses should not be discarded outrightly rather it should be scanned and scrutinized carefully and cautiously. On careful and cautious



scanning and scrutiny of the testimonies of the aforesaid witnesses and the testimony of the I.O., it appears that the testimonies of the aforesaid witnesses given before the court is full of contradictions with the statement given before the I.O. regarding occurrence, manner of occurrence, assault, assailant, etc. Hence, in view of the aforesaid contradiction, testimony of the aforesaid witnesses does not inspire my confidence to hold conviction of the appellants relying upon the same.

17. PW-2 Atwariya Devi has stated in Para-10 of her cross-examination that her brother-in-law (Dewar) and the Chaukidar went to the police station. PW-3 has stated in Para-7 of her cross-examination that the Chaukidar had arrived at the place of occurrence in the night and she had divulged entire occurrence to him. He rushed to the police station. Thereafter, the S.I. arrived there alongwith the chaukidar. The I.O. examined in this case as PW-4 has stated in Para-5 of his cross-examination that the chaukidar had given information to the police station, but he had not disclosed the name of the assailant of the deceased. The aforesaid statement of the said witness candidly indicates that in the earlier disclosure of the occurrence by the chaukidar at the police station, the name of the appellants had not been taken by him.

18. From perusal of the statement of the I.O. in Para-1



of his examination-in-chief and also in Para-4 of his cross-examination, it appears that he got information on 16.07.1996 at 05:30 AM that a thief was apprehended in village Maniari who has died and before recording of Sanaha, Sitamarhi P.S. Case No. 190 of 1996 was instituted on the basis of the statement of Rampat Mahto. F.I.R. of said P.S. case marked as Exhibit-C/1, filed by the defence indicates that the aforesaid P.S. Case was instituted on the basis of the fardbeyan of Rampat Mahto regarding committing of theft in his house by the deceased Ram Babu Ram in the night of 15.07.1996. The thief was apprehended and in the meantime, nearby villagers had congregated there and assaulted Ram Babu Ram by means of leg, fist and lathi resulting into his death. The aforesaid evidence of the defence and testimony of the I.O. indicate that theft was committed in the house of Rampat Mahto by the deceased in the night of day of occurrence and he was apprehended and thrashed to death by the villagers by assaulting him by means of leg, fist and danda and F.I.R. regarding the said occurrence was registered earlier to giving information to the police station regarding the instant occurrence by the chaukidar. The son of the informant namely Pachu Ram who had accompanied the chaukidar to the police station after the occurrence has not been examined by prosecution rather withheld by it and no explanation has been assigned by the prosecution for his non-



examination, hence, adverse inference is drawn against the prosecution. Thus, from perusal of the aforesaid ocular evidence of the prosecution, I find and hold that the prosecution has utterly and miserably failed to substantiate its case by adducing consistent, worth credence and reliable ocular evidence.

19. The prosecution has filed post mortem report of the deceased. The doctor who has conducted the autopsy of the dead body of the deceased has not been examined by the prosecution and the prosecution has also not proved that the said doctor has either died or he cannot be found or has become incapable of giving evidence or his attendance cannot be procured without an amount of delay or expense which to the court may appear unreasonable in the circumstance of the case. In view of the aforesaid provision of law, if the prosecution has withheld the doctor and post mortem report is exhibited formally by a person who is not acquainted with medical science and not worked with the doctor and is also not acquainted with his signature and handwriting, the same would be inadmissible in evidence. The post mortem report was not proved by the said doctor rather by the formal witness, namely, Nagendra Yadav (PW-5) who happens to be *Karpardaj*. In his cross-examination, he has candidly stated that the post mortem report was not prepared before him. He has no knowledge of its content and he has no corresponding



terms with the doctor. Said evidence of PW-5 indicates that he is neither acquainted with the said doctor nor has worked with him nor the post mortem report was prepared before him nor he has any knowledge of medical science. Thus, the post mortem report has not been legally brought on record by the prosecution as per Section 32 of the Indian Evidence Act, hence the said post mortem report is not admissible in evidence. Hon'ble Apex Court in **Vijender Versus State of Delhi** reported in **(1997) 6 Supreme Court Cases 171** has been pleased to rule that in view of Section 60 of the Evidence Act, the prosecution is bound to lead the best evidence available to prove a certain fact and in the instant case it was the doctor who held the post-mortem examination. It is of course true that in an exceptional case where any of the pre-requisites of Section 32 of the Evidence Act is fulfilled a post mortem report can be admitted in evidence as a relevant fact under sub-section (2) thereof by proving the same through some other competent witness but this section had no manner of application of the present case for the evidence of record clerk clearly reveals that on the date he was deposing the doctor who conducted the post mortem report was in hospital where the post mortem was conducted. Thus, the post mortem report was proved by the record clerk of the hospital and the doctor conducted the post mortem report was not examined. Hence, the said post mortem report



was not admissible in evidence. Thus, the aforesaid contradictory and inconsistent ocular evidence also does not stand corroborated by the medical evidence.

20. In view of the aforesaid facts and circumstances of the case, I find and hold that the prosecution has utterly and miserably failed to substantiate its case by adducing consistent, trustworthy, worth credence and reliable ocular and documentary evidence. Hence, the appellants are entitled to get benefit of doubt and the impugned judgment and order of conviction and sentence passed by the learned lower court is set aside and the appellants are acquitted from the charge levelled against them. As the appellants are on bail, they are discharged from the liability of the bail bonds. Accordingly, this appeal is allowed.

(Prakash Chandra Jaiswal, J)

Mishra/-

AFR/NAFR	N.A.F.R.
CAV DATE	N.A.
Uploading Date	
Transmission Date	

