

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No. 578 of 2012

Arising Out of PS. Case No.-200 Year-2006 Thana- Phulparas (Ghoghardiha) Distt-
Madhubani

1. Mohit Paswan
2. Rohit Paswan; Both S/o Debdat Paswan, Resident of
Village - Brahmotra, P.S. Ghoghardiha, District – Madhubani.

... .. Appellants

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant/s	:	Mr. Suraj Narayan Yadav, Adv. Mr. Bijay Bhushan Prasad, Adv. Ms. Vandana Singh, Adv.
For the Respondent/s	:	Mr. Ajay Mishra (A.P.P.)

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 12-12-2017

The present appeal has been preferred by aforesaid two appellants against judgment of their conviction dated 13-01-2012 passed by learned Additional Sessions Judge, Fast Track Court – III, Madhubani (hereinafter referred to as the ‘Trial Judge’) in Sessions Trial No. 462 of 2007. By the said judgment, appellants have been held guilty and convicted under Section 302 read with Section 149 of the Indian Penal Code and they have been sentenced by order dated 17-01-2012 to undergo rigorous imprisonment for life and fine of Rs. 10,000/- (ten



thousand) each and in default, they have further been directed to undergo rigorous imprisonment for two years.

2. Short fact of the case is that on 24-10-2006 at 7:05 A.M. (morning), the Assistant Sub-Inspector of Police Suresh Prasad Sah of Police Station Ghoghardiha recorded *fardbeyan* of Prem Kumar Jha in the clinic of Dr. Gopal Chandra Jha at Ghoghardiha Bazar. In the *fardbeyan*, the informant (P.W.9) stated that in the preceding night, he alongwith Anil Kumar Jha (deceased), Santosh Kumar Jha (P.W.5) and Manchan Jha (P.W.7) on the eve of Kali Puja had come to Ghoghardiha to witness an orchestra programme. At 3:00 in the morning on the same date, informant alongwith Anil Kumar Jha (deceased) came to station chowk for taking tea. While, they were sipping tea, villagers of Brahmotra village namely (1) Mohit Paswan (appellant no. 1), (2) Rohit Paswan (appellant no. 2), (3) Mithilesh Paswan S/o Gujar Paswan, (4) Anil Paswan, (5) Mithilesh Paswan S/o Gangai Paswan and (6) Binod Paswan, all started abusing him (Anil Jha) without any reason. The informant tried to stop them. In the meanwhile, the appellant no. 1 Mohit Paswan and appellant no. 2 Rohit Paswan, both sons of Debdatt Paswan, with intent to kill, gave *lathi* blow on Anil Kumar Jha (deceased) and also on him. It was alleged that both



accused persons indiscriminately gave number of *lathi* blow, in which, both i.e. informant and Anil Kumar Jha (deceased) received head injury and other injuries. Anil Kumar Jha had got serious injuries than the informant in the occurrence. It was further alleged by the informant that the accused persons were also using fist and leg. Thereafter, number of persons arrived there. The informant further stated that even in injured condition, he caught hold of both the appellants, however; in the meanwhile, other accused persons, after snatching golden chain from the neck of Anil Kumar Jha (deceased), fled away. The informant and Anil Kumar Jha thereafter were carried to a private clinic of Dr. Gopal Chandra Jha (P.W.10). The informant disclosed that both injured were carried to the clinic of Dr. Gopal Chandra Jha with the help of police and other villagers. Due to said injury, Anil Kumar Jha had come to the stage of unconsciousness.

3. On the basis of *fardbeyan* of the informant, on the same date i.e. on 24-10-2006 at 10:00 A.M., a formal F.I.R., vide Phulparas (Ghoghardiha) P.S. Case No. 200 of 2006, was registered for offence under Sections 147, 148, 323, 379, 307, 504 of the Indian Penal Code against those named accused persons, which include the name of aforesaid two appellants.



Subsequently, after the death of Anil Kumar Jha, by order dated 30-10-2006, Section 302 of the Indian Penal Code was added in the F.I.R. The police during investigation found accusation true against all the F.I.R. named accused persons and thereafter, on 22-01-2007, chargesheet was submitted against all the six F.I.R. named accused. Thereafter, on 13-03-2007, the learned Magistrate took cognizance of offences. However, before commitment, other four accused persons claimed their juvenility at the time of occurrence and as such, their cases were referred to Juvenile Justice Board and finally, the case in respect of aforesaid two appellants was committed on 19-05-2007 to the court of sessions and it was numbered as Sessions Trial No. 462 of 2007. On 12-06-2007, charge under Section 302/149, Section 307/147 and Section 147 of the Indian Penal Code was framed jointly against both the appellants. Since, the appellants denied charges and claimed to be tried, the prosecution, to prove its case, examined altogether 14 witnesses.

4. At the very outset, it is necessary to indicate that the prosecution, without any rhyme and reason, has failed to examine the investigating officer as prosecution witness. During the trial, neither *fardbeyan* nor formal F.I.R. was got proved. In



the case, inquest report has also not been formally proved. Most of the witnesses, during the trial had turned hostile.

5. P.W.2 Punia Nand Jha, P.W.3 Bana Lal Kamath, P.W.8 Dev Kumar Mandal and P.W.12 Kanhaiya Jha were declared hostile, whereas, P.W.4 Lalit Kamath, P.W.13 Mukund Jha @ Baccha Jha and P.W.14 Gopal Jha were only tendered for cross-examination. P.W.1 Ramu Sah, though has not at all stated anything about the occurrence or supported the prosecution case, to the reasons best known to the prosecution, he was not even declared hostile. P.W.5 Santosh Kumar Jha, P.W.6 Abhishek Kumar Jha and P.W.7 Santosh Kumar @ Manchan Jha have been examined as hearsay witness as well as introduced the case, as if, prior to the main occurrence, some altercation had taken place in between the accused side and informant side. P.W.9 Prem Kumar Jha (informant) was injured and also examined as eye-witness, whereas, Dr. Gopal Chandra Jha P.W.10, who had claimed to examine the injury on the person of the informant as well as deceased on the date of occurrence, had proved their injury reports, as **Ext. 3** and **3/1** and P.W.11 Dr. Subhash Chandra Jha, who was posted on 27-10-2006 as Civil Assistant Surgeon, Sadar Hospital, Madhubani, had conducted *post-mortem* examination on the dead body of deceased Anil Kumar Jha.



6. After completion of the prosecution evidence, circumstances and evidences collected against both appellants were explained to them and on 14-10-2011, their statement under Section 313 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") was recorded. The defence, with a view to demolish the case of the prosecution, has also examined two witnesses, as defence witness, namely D.W.1 Ramphal Paswan, D.W.2 Shivji Paswan.

7. Sri Suraj Narayan Yadav, learned counsel assisted by Sri Bijay Bhushan Prasad, learned counsel for the appellants, after placing entire evidences i.e. oral and documentary evidence, has argued that actually informant as well as deceased were assaulted by a mob, who were watching orchestra programme on the eve of Kali Puja and since Anil Kumar Jha (deceased) had misbehaved with the wife of appellant no. 1 (Mohit Paswan), by the mob, both informant and deceased were assaulted, but since the wife of the appellant no. 1 was misbehaved prior to the occurrence in orchestra programme, it appears that informant side has falsely implicated both the appellants in the present case.

8. Sri Yadav, learned counsel for both appellants has further argued that since prosecution in the case has not at all



proved the place of occurrence, the learned Trial Judge was required to pass acquittal order, but the learned Trial Judge, ignoring all such illegality, has passed the order of conviction. By way of referring to **Ext. 3** and **3/1** i.e. report in respect of injury on deceased as well as informant, who were examined by P.W.10 Gopal Chandra Jha, Sri Yadav, learned counsel for the appellants has argued that injury referred in the injury report in respect of deceased differs from the injury noticed on the person of deceased in the *post-mortem* examination report. He has elaborately argued that on the skull of the deceased while being examined by P.W.10 Dr. Gopal Chandra Jha, he had noticed that the incised injury on the scalp was about 6" x ½" x ½", whereas, during post-mortem examination, the said injury has been referred as 2 ½ " x ½ ". He submits that in any event, size of injury, after being examined while deceased was alive and after his death, may not differ up-to such large extent. According to him, the injury report of examination of the deceased by the P.W.10 Dr. Gopal Chandra Jha comes into the cloud of doubt. Learned counsel for the appellants has further argued that there is apparent inconsistency in the evidence of P.Ws. 5, 6, 7 and 9. By way of referring to evidence of informant (P.W.9), it has been argued that it is difficult to believe that the informant in such



injured condition i.e. having incised wound on his scalp, would be in a position to caught hold of two accused persons, whereas in his evidence, the informant had said that in such injured condition, he caught hold of two accused persons i.e. appellants and thereafter, police and villagers arrived. Regarding the evidence of P.Ws. 5, 6 and 7, it has been argued that their evidence is contrary to the evidence of the informant (P.W.9). He submits that those three witnesses, who have claimed to be hearsay witnesses, in their evidence have tried to develop a case as if the main occurrence had taken place due to the reason that prior to the main occurrence at about 2 and 2 ½ in the night during orchestra programme, some altercation had taken place in between the accused side and informant side. He submits that had it been a true story, the informant in his *fardbeyan* or even in his deposition during the trial would have made specific statement that prior to the main occurrence, some altercation had taken place in the orchestra programme regarding occupying place, whereas, three witnesses have stated that altercation in between the parties had taken place in orchestra programme itself at 2 and 2:30 AM, when the informant and deceased went to take tea. They (witnesses) heard *hulla* and thereafter, they reached the place of occurrence, where they noticed that both



informant and deceased were in injured condition and blood was coming out from their injuries. Learned counsel for appellants has further argued that the informant, who is the injured and eye-witness, has made specific assertion that in the occurrence, he was assaulted by means of *lathi* by the accused person or by fist and leg, nothing was indicated by the informant (P.W.9) that any of the accused persons had used any sharp cutting weapon, however; in the injury report i.e. **Ext. 3** and **3/1** in respect of both informant and deceased, the major injury was caused by sharp cutting weapon. It has been argued that it appears that in the mob, some person had used sharp cutting weapon, which was not even noticed by the informant.

9. Learned counsel for the appellants has further tried to persuade the Court that the prosecution has not proved its case beyond all reasonable doubt, in view of the fact that though alleged occurrence had taken place on 24-10-2006 and subsequently, injured Anil Kumar Jha died, but in entire evidence, this fact has not been brought on record as to on which date and what time he died. He further submits that witnesses have said that the injured Anil Kumar Jha was firstly referred by Dr. Gopal Chandra Jha (P.W.10) to Sadar Hospital, Madhubani and from Madhubani, he was shifted to Tara Nursing Home, a



private hospital in Patna and died there, but to the reasons best known to the prosecution, in the present case, inquest report was shown to be prepared in the campus of Sadar Hospital, Madhubani in Ambulance. By way of referring to facts incorporated in the inquest report, which has not even been exhibited, he has argued that statement in the inquest report has been made that the deceased died in the Tara Nursing Home at Patna. He further submits that though inquest report was shown to be prepared on 27-10-2006 at 2:30 PM, it has not been clarified as to what was the occasion for preparing such inquest report at Madhubani, whereas, in the inquest report itself, it was indicated that death of deceased had occurred at Tara Nursing Home, Patna. The signature on inquest report was made by P.W.7 Santosh Kumar @ Manchan Jha, who was uncle of the deceased, was proved and marked as **Ext. 1** and he himself has proved signature of one Dinanath Jha on the said inquest report and same was marked as **Ext. 1/1**, however; to the reasons best known to the prosecution, the witness Dinanath was not produced for his evidence. It has also been argued that informant in his *fardbeyan* as well as in his evidence has stated that occurrence had taken place at tea stall, the investigating officer had not bothered to record statement of either shop-keeper of



that tea stall or any other local witness. It has been argued that in absence of production of investigating officer, the prosecution has failed to establish the place of occurrence, and as such, benefit of doubt was required to be extended to the appellants, which has not been done by the learned Trial Judge.

10. Sri Ajay Mishra, learned Addl. Public Prosecutor, though has opposed the appeal, he was not in a position to defend the case properly, since in the present case, the investigating officer, without any rhyme and reason, had not come to depose to prove *fardebayan*, formal F.I.R. or even inquest report.

11. Besides hearing learned counsel for the parties, we have also perused entire materials available on record. Before proceeding, it would be necessary to summarily discuss the evidence of the informant i.e. P.W.9 Prem Kumar Jha. This witness has proved his signature on *fardebayan* and in his evidence, he stated that on the date of occurrence, in the morning at 3:00 AM, while he alongwith Anil Kumar Jha was taking tea at the station chowk, near the tea stall, both the appellants started to abuse them and on being prevented, those F.I.R. named accused persons brutally assaulted them by means of *lathi* and he and Anil Kumar Jha received injury. In his injured condition, he



caught hold of both the appellants. In the meanwhile, police arrived and both the appellants were handed over to the police. He proved his signature on his *fardbeyan*, which was marked as **Ext. 2** and in cross-examination, in paragraph – 5, he stated that he was knowing all the accused persons since prior to the occurrence and there was no animosity with them. He stated that on the tea stall, there were 15-20 other persons who were taking tea. In paragraph – 6 of his cross-examination, he stated that after the occurrence, he was conscious, however; Anil Jha had become unconscious. On this very point, it is necessary to refer to the evidence of P.W.6 Abhishek Kumar Jha and in paragraph – 5 of his cross-examination, he has stated that after receiving injury, the informant and Anil Kumar Jha both walkingly went to the clinic of Dr. Gopal Chandra Jha. In paragraph – 7 of his cross-examination, the informant has stated that Anil Jha had received injury on his head and on his entire body, there were injuries by the use of *Danda*. His head was also broken and on his person also, there were number of injuries. He denied the suggestion that since he had misbehaved with the female member of the appellant side, they were assaulted by the volunteers of the orchestra programme committee. At this juncture, it is necessary to reiterate that P.W.5, 6 and 7 have also



categorically stated that both informant and deceased were assaulted by means of *Danda*, none of the witnesses have said regarding use of any sharp cutting weapon.

12. Accordingly, it would be necessary to examine the evidence of P.W.10 Dr. Gopal Chandra Jha. On 24-10-2006, he was privately practicing at Ghoghardiha and on the same date, he examined the injuries of Anil Kumar Jha (deceased) and found following injuries:-

“(i) Incised cut wound size 6” x ½” x ½” situated on the scalp with profuse bleeding.

Nature of injury – grievous, caused by sharp weapon.

(ii) Bruise 8” x ¼” situated in the back of chest.

Nature – simple caused by hard blunt substance.”

On the same date, Dr. Gopal Chandra Jha further examined the injuries of P.W.9 Prem Kumar Jha and found following injuries:-

“(i) Incised cut injury 4” x ¼” x ¼” situated on the scalp.

Nature – sharp cutting, simple.

(ii) Bruise 2” x 1/6” situated on the right palm.

Nature – simple, caused by hard blunt substance.

(iii) Bruise 3” x 1/6” situated on right arm.

Nature – simple, caused by hard blunt substance.

(iv) Bruise 7” x ¼” situated below right knee joint.

Nature – simple, caused by hard blunt substance.”



He proved the injury report in relation to Anil Kumar Jha as well as informant, which were marked as **Ext. 3** and **3/1** respectively.

13. On going through the evidence of P.W.10 Gopal Chandra Jha, it is evident that though informant and other witnesses had stated that informant and deceased had received multiple injury due to *lathi* blow on the person of the deceased, P.W.10 had noticed only two injures, one injury caused by sharp cutting weapon and another injury by hard and blunt substance. Similarly, on the body of the informant/P.W.9, four injuries were found and out of four injuries, injury no. 1 was caused by sharp cutting weapon and other injuries were simple in nature caused by hard and blunt substance. Meaning thereby that oral evidence in the present case is not supported by medical evidence. It is true that in a criminal trial, only on the ground of inconsistency in between the oral and medical evidence, accused may not be acquitted, but considering the glaring inconsistency in the evidence as well as non-proving of place of occurrence or non-examination of the investigating officer, such inconsistency in oral and medical evidence is sufficient to draw an inference that the prosecution have not proved its case beyond all reasonable doubt. However, in the present case, there is discrepancy in the



nature of injuries noticed by P.W.10 Dr. Gopal Chandra Jha as well as injury found on the person of the deceased Anil Kumar Jha in *post-mortem* examination report.

14. P.W.11 Dr. Subhash Chandra Rai on 27-10-2006 was posted as Civil Assistant Surgeon, Sadar Hospital, Madhubani and on the same date, he conducted *post-mortem* examination on the dead body of the deceased Anil Kumar Jha and in the *post-mortem* examination, he could notice only one injury i.e. stitched wound in forehead size 2 ½” x ½” deep to bone. This witness i.e. P.W.11 has stated that *post-mortem* examination report was in his own handwriting and signature and he proved the same, which was marked as **Ext.4**.

15. On examination of *post-mortem* examination report i.e. **Ext. 4**, injury report i.e. **Ext. 3** in relation to injury of Anil Kumar Jha, which was examined by Dr. Gopal Chandra Jha P.W.10 and oral evidences, there are several inconsistencies. On the one side, informant and other witnesses have consistently said that in the occurrence, except *lathi*, no weapon was used, whereas, in injury report (**Ext. 3**) incised wound on scalp of deceased was found, which was in the size of 6”x ½” x ½”, however; in the *post-mortem* examination report, the size of such



injury was shown to be reduced and it has been mentioned as 2 ½” x ½”.

16. Moreover, in the case, the prosecution, due to non-examination of the investigating officer, has completely failed to prove the place of occurrence, whereas, in the defence evidence, it has been brought on record that while watching orchestra programme on the eve of Kali Puja, the deceased had misbehaved with the wife of appellant no. 1 and thereafter, volunteers of the orchestra programme organisation and others had brutally assaulted both the informant and the deceased. Ofcourse, in a criminal trial, much reliance may not be placed on the defence evidence, but considering the facts and circumstances, particularly non-examination of the investigating officer, inconsistency in the oral evidence as well as medical evidence, certainly, some reliance can be placed on the evidence of defence witnesses, whereas, from the prosecution side, number of witnesses have turned hostile.

17. In view of facts & circumstances and evidence, which we have discussed hereinabove, we are of the considered opinion that it is a fit case for extending benefit of doubt. Accordingly, by way of extending benefit of doubt, we set aside the judgment of conviction and sentence in respect of both the



appellants.

18. Accordingly, the judgment of conviction and sentence dated 13.01.2012 and 17.01.2012 respectively passed by learned Additional Sessions Judge-cum-Fast Track Court – III, Madhubani in Sessions Trial No. 462 of 2007 {arising out of Phulparas (Ghoghardiha) P.S. Case No. 200 of 2006} is, hereby, set aside and appeal is allowed.

19. Since the judgment of conviction and sentence has been set aside and appellants are in custody, it is, hereby, directed to release them forthwith, if not wanted in any other case.

(Rakesh Kumar, J.)

(Mohit Kumar Shah, J.)

Anay

AFR/NAFR	AFR
CAV DATE	N/A
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