

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.305 of 2002

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

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Majrool Haque Ansari, son of Late Jangsher Ali, resident of village Kailtole
Muschari, Police Station Barhariya, District Siwan. Appellant.

Versus

The State of Bihar. Respondent.

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Appearance:

For the Appellant : Mr. U.N. Singh, Adv.
Mr. Ajay Kumar Pandey, Adv.
For the State : Mr. Bipin Kumar, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL
ORAL JUDGMENT

Date: 14-11-2017

Heard learned counsel for the appellant and learned
A.P.P. for the State on this criminal appeal.

2. This criminal appeal has been preferred against
the judgment and order of conviction and sentence dated
19.06.2002 passed by the Fast Track Court-I, Siwan in Sessions
Trial No.20 of 1989/02 of 2002, arising out of Barharia P.S. Case
No.41 of 1986, whereby the learned trial Court convicted the
appellant under Section 304 Part II of the I.P.C. and sentenced
him to undergo rigorous imprisonment for three years and slapped
him with a fine of Rs.2000/- and in default of payment of fine to
further undergo rigorous imprisonment for six months for the said
offence.

3. The factual matrix of the case is that Barharia
P.S. Case No.41 of 1986 was instituted under Section 302 of the



Indian Penal Code against the accused-Majrool Haque Ansari on the basis of fardbeyan of Bageshwar Mishra, son of Sri Lalit Narayan Mishra, resident of village Kailtole Sheo Dhar Hata, P.S. Barhariya, District Siwan, recorded by S.I. B. Singh O/c Barharia Police Station on 31.03.1986 at 7 PM with the allegation in succinct that on 31.03.1986 at 6:15 PM, he had arrived at Kailgar hata. He heard sound of screaming of his grandmother and immediately rushed to the place of occurrence and witnessed accused-Majrool Haque Ansari assaulting on the head of his grandmother shoving her on ground by brick bat. His grandmother was badly injured and blood was sprouting. When he tried to rescue her, the said accused assaulted on his head by brick bat due to this he fell down. On hulla Ravi Prakash Mishra rushed there and witnessed the incident. When he tried to rescue them, the accused also attacked on him by brick bat and made him injured. On hulla, Jhulan Mishra, Rajballabh Singh and Ramashish Singh arrived there and witnessed the occurrence. After death of his grandmother, the accused left the scene. But he was apprehended by the villagers giving him chase. The bone of contention is that his grandmother and widow of Bansidhar Mishra were defecating on the boundary. In the meantime, the accused pounced upon the said widow which was intervened by his grandmother. The widow



fled away making halla but his grandmother was murdered by the said accused by assaulting her by means of brick bat.

4. The aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted chargesheet against the accused-Majrool Haque Ansari under Section 302 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 and committed the case to the Court of Sessions and on transfer finally the case came in *seisin* of Fast Track Court No.I, Siwan for trial.

6. The charge against the accused was framed under Section 302 of the Indian Penal Code. The charge was read over and explained to him, to which he pleaded not guilty and claimed to be tried.

7. To substantiate its case, in ocular evidence, the prosecution has examined altogether eight witnesses, namely, Jhulan Mishra as P.W.1, Shankar Mishra as P.W.2, Dulan Prasad as P.W.3, Manager Singh as P.W.4, Raj Ballabh Singh as P.W.5, Ravi Prakash Mishra as P.W.6, informant Bageshwar Mishra as P.W.7 and Om Prakash Pandey as P.W.8. Out of the aforesaid witnesses, P.W.3-Dulan Prasad and P.W.8-Om Prakash Pandey



happen to be formal witnesses who have proved formal F.I.R. and postmortem report respectively while P.W.4 happens to be hostile witness. In documentary evidence, the prosecution has filed and proved several documents.

8. Statement of the accused was recorded under Section 313 of the Code of Criminal Procedure. The case of the defence is complete denial of the occurrence. In buttress of his case, the accused has filed and proved O.P.D. ticket of Mental Hospital, Ranchi marked as Ext.A.

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 earlier paragraph.

10. Being aggrieved and dissatisfied with the impugned judgment and order of conviction and sentence, the convict has preferred this criminal appeal.

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

12. It is submitted by learned counsel for the appellant that prosecution has examined five material witnesses in the case. Out of them, four witnesses are hearsay witnesses of the occurrence. The only eye-witness is the informant (P.W.7) of this



case. The informant has claimed himself to be the injured of the case but the prosecution has not filed any injury report regarding sustaining injury of the informant in the occurrence. Thus, the aforesaid evidence of the informant does not stand corroborated by the medical evidence. Moreover, the cause of death has not been established by the prosecution as the postmortem report has not been proved by the doctor who conducted the autopsy of the cadaver of the deceased and the said postmortem report is not admissible in evidence and cannot be relied upon. Thus, the aforesaid testimony of the witness regarding death of deceased sustaining injury at the hand of the appellant does not stand corroborated by the medical evidence. The I.O. of the case has not been examined by the prosecution. Due to non-examination of I.O., the place of occurrence does not stand established. Thus, the prosecution has utterly and miserably failed to substantiate its case by adducing, consistent, trustworthy, reliable ocular and documentary evidence.

13. On the other hand, learned A.P.P. advocating the correctness and validity of the impugned judgment and order of conviction and sentence, submitted that the informant is the eye witness of the occurrence and he has proved the prosecution case in toto. His evidence also stand corroborated by the Post Mortem



Report of the deceased and the learned trial Court correctly appreciating the facts and materials 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 record, it appears that to substantiate its case, the prosecution has examined five material witnesses of the case. Out of the aforesaid witnesses, P.W.1-Jhulan Mishra, P.W.2- Shankar Mishra, P.W.5-Raj Ballabh Singh and P.W.6-Ravi Prakash Mishra happen to be hearsay witnesses of the occurrence. As P.W.1 has stated in para-2 of his cross-examination that when he arrived near the place of occurrence, 50-100 persons were congregated there from before. The deceased was lying there. Likewise P.W.2 has stated in para-3 of his cross-examination that when he arrived at the place of occurrence, he found the deceased lying on the ground. In his examination-in-chief he has stated that Ravi Prakash divulged him that Majrool Haque had killed his mother. P.W.5 in para-2 of his examination-in-chief has stated that when he arrived at the place of occurrence he witnessed Majrool Haque absconding. Ravi Prakash told him that Majrool Haque was escaping after assaulting his grandmother by brick bat. P.W.6 has stated in para-2 of his cross-examination



that when he arrived at the place of occurrence, he witnessed accused Bageshwar and his mother there. His mother was lying on the ground. She was senseless and the blood was oozing from her person and she was taking her last breath. The aforesaid testimony of the witnesses clearly indicates that these witnesses had arrived at the place of occurrence after culmination of the occurrence of assaulting the deceased by the appellant. P.Ws.2 & 5 have stated in their respective examination-in-chief that Ravi Prakash had divulged him that the accused was absconding after assaulting the deceased by brick bat but the said Ravi Prakash P.W.6 has not corroborated the factum of divulgence of said fact to the aforesaid witnesses. Thus, for want of corroboration, the aforesaid evidence of the said hearsay witnesses is not admissible in the evidence.

15. Thus there is only eye witness of the occurrence who is the informant, P.W.7-Bageshwar Mishra. From perusal of the testimony of the aforesaid witness, it appears that in his examination-in-chief he has stated that when he arrived at the place of occurrence responding hulla made by his grandmother, he witnessed the accused Majrool Haque assaulting his grandmother by means of brick bat by climbing on her chest and his grandmother succumbed to her injury on the spot. But, in para-4



of his cross-examination, he has stated that while he was proceeding to market he listened the sound at 25-30 steps ahead of P.O. and when he arrived at the place of occurrence he found his grandmother lying on the ground and blood was oozing from her person. She was alive by that time but she succumbed to her injury after 10-15 minutes. The aforesaid statement of the informant happens to be in quite contradiction to his examination-in-chief and rules out witnessing of the occurrence by him. As in the said cross-examination, he has stated that when he arrived at the place of occurrence, he found his grandmother lying on the ground and blood was oozing from her person and she succumbed to her injury 10-15 minutes later which means that he had arrived at the place of occurrence after culmination of the occurrence of assault and has not seen the occurrence of assault by the accused. Moreover, he has stated in his examination-in-chief that when he tried to save his grandmother accused also assaulted on his head by means of brick bat. In para-8 of his cross-examination, he has stated that he and Ravi Prakash were treated in Barharia but no injury report has been brought on record indicating the sustaining of the injury by the informant at the time of occurrence. The aforesaid aspect of the case also goes to rule out the presence of the informant at the place of occurrence at the time of occurrence



and witnessing of occurrence by him.

16. The prosecution has filed post mortem report of the deceased, but 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. The post mortem report was proved by formal witness, namely, Om Prakash Pandey (PW-8) who happens to be Advocate's Clerk. In his cross-examination, he has candidly stated that the postmortem report was not prepared before him. He has no knowledge of its content. Said evidence of PW-8 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 its contents. Moreover, he has also no knowledge of medical science as he happens to be mere an advocate clerk. 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.

17. Thus, the post mortem report has not been proved and 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 and cause of death of the deceased does not stand substantiated by the prosecution. Hon'ble Apex Court in the case of **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. Hence, the said post mortem report was not admissible in evidence.

18. As per the prosecution case and witness account, the deceased was bleeding and as per account of PW-6 huge amount of blood had fallen on P.O. but the I.O. of the case has not been examined by the prosecution to substantiate the



factum of finding of blood at the place of occurrence and collection of blood stained earth and sending it for chemical examination by the I.O.. As I.O. of the case has not been examined by the prosecution, the place of occurrence also does no stand established by it.

19. 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 the prosecution case and bring home the charge levelled against the appellant beyond all reasonable doubts by adducing consistent, trustworthy, reliable ocular and documentary evidence. Hence, the impugned judgment and order of conviction and sentence passed by the learned trial Court is set aside and the appellant is acquitted from the charge levelled against him. As the appellant is on bail, he is discharged from the liability of bail bond.

20. Accordingly, this criminal appeal is allowed.

(Prakash Chandra Jaiswal, J.)

Trivedi/-

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