

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.517 of 2013

Arising Out of PS. Case No.-240 Year-2010 Thana- GHOSI District- Jehanabad

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Dharmendra Kumar, son of Sri Madhusudan Sharma, resident of village-
Pariawan, Police Station-Ghoshi in the district of Jehanabad

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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Appearance:

For the appellant

Mr. Kanhaiya Prasad Singh, Sr. Advocate

Mr. Jharkhandi Upadhyay

Mr. Pratik Mishra

For the State

Mr. S.N.Prasad, APP

For the Informant

Mr. Sunil Kumar

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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 : 15-09-2017

Taking exception to the judgment of conviction dated 14th May, 2013 and order of sentence dated 21.05.2013, passed by the District and Sessions Judge, Jehanabad in Sessions Trial No. 226 of 2011 convicting the appellant under section 302 IPC and section 27 of the Arms Act, the sole appellant has filed the appeal.

2. On 5th November, 2010, at about 4.30 P.M., the police on getting telephonic message of the incident, arrived in village where the informant was present besides the dead body of his son. A written report (Ext.4) duly witnessed by P.Ws 4 and 5 was handed



over to the SHO (P.W.10). The prosecution case adumbrated in the written report and presented at the trial, in brief, is that the informant (P.W.9) along with his nephew (P.W.3) was proceeding towards his home through village Atiyawan. His son Gaurav Kumar (deceased) met on the way as he had come to deliver wheat for threshing/crushing on the flour mill/shop of P.W. 7. He, too, proceeded towards home and was walking ahead of the informant and P.W. 3. As the deceased crossed the channel (Pyne) which bifurcates the village Atiyawan with village Pariawan and reached the village road close to the house of the appellant, it is alleged, the appellant appeared from his house armed with a rifle and shot at the forehead/temple of the deceased, who fell down on the road. The informant (P.W.9) and P.W. 3 rushed to the victim in a bid to save him. The prosecution case further is that other co-accused persons thereafter opened firings which did not hit either the informant or the P.W.3. The other accuseds of the case also assembled at the place of occurrence and resorted to firings. Subsequently, they ran over to the rooftop of the house and resorted to firings. On receiving the written report, the I.O. immediately swung into action and arrested the appellant from his house. The death inquest report (Ext.7) was carried out at the place of occurrence which was witnessed by P.Ws 3 and 8. The house of



the appellant was searched and one double-barreled gun with 39 live cartridges and a rifle were seized under seizure memo (Ext.3) in presence of P.W. 3 and P.W. 8. The dead body was dispatched for post-mortem examination. The seized arms and ammunition (Ext.7) were sent for chemical examination by the Sergeant Major. After obtaining permission of the court, those arms and ammunition were also sent for chemical analysis by the FSL at Patna. The report furnished on examination of those arms and ammunition is Ext. 7/A. After recording the statement of the witnesses and obtaining the report(s) such as the post-mortem examination report (Ext. 8), Sergeant Major's report (Ext. 7) and FSL report (Ext. 7/A) the charge sheet was laid against the appellant which ultimately led to the trial. The appellant abjured the guilt and claimed the trial.

3. At the trial, the prosecution, in order to prove the charges beyond shadow of reasonable doubt, examined 11 prosecution witnesses. A brief resume of the witnesses is/are as under:-

4. P.W. 1 Vijay Prasad Sharma is a co-villager who reached the scene of occurrence soon after the assault. He has narrated the second part of the prosecution case. P.W. 2 Sanjay Kumar is the full brother of the informant and uncle of the deceased. He has supported the prosecution case as an eye-witness to the entire



incident. P.W. 3 Rajiv Kumar was following the deceased with the informant. He has given the ocular description of the occurrence. P.W. 4 Abhay Kumar, P.W. 5 Nawlesh Sharma and P.W.6 Ranjay Sharma are the nephews of the informant and cousin brothers of the deceased. P.W. 4 Abhay Kumar and P.W. 5 Nawlesh Sharma are the two nephews of the informant and cousin brother of the deceased who have taken the dock and narrated the prosecution case as eye-witnesses. They are also the attesting witnesses to the written report (Ext.4) submitted immediately after the occurrence to the I.O. P.W. 6 is not directly related to the informant. He is cousin brother of P.W. 3 Rajiv Kumar. He, too, has supported the prosecution case as an eye-witness. P.W. 7 Ramanuj Sharma is the flour mill owner. He has testified to the effect that on the relevant date immediately preceding the the time of occurrence, the deceased had come to his shop to deliver wheat for milling/crushing. He left the shop and soon thereafter he noticed commotion/chaos on the road. Out of tizzy, he reached the place to find the dead body of the victim lying on the road near the house of the appellant. P.W. 8 Santosh Kumar reached the place of occurrence after the assault was inflicted on the victim. He is one of the witnesses to the inquest report (Ext.2) as well as the seizure of the arms and ammunition



from the house of the appellant (Ext.3). P.W.9 being the informant of the case has supported the prosecution case as spelled out in the written report (Ext.4). P.W. 10 Kameshwar Singh was then posted as SHO, Ghosi police station. He received a phone call about the incident in the village. After reducing the information into a Sanha he immediately proceeded to the village. On his arrival in the village, P.W. 9 filed the written report (Ext.4) at 6.00 P.M. The I.O. immediately swung into action and effected the arrest of the appellant, prepared the inquest report, recorded the statement of the witnesses, prepared the sketch map of the place of occurrence (Ext.6) and on conclusion of investigation laid the charge sheet. P.W. 11 Dr. Ashok Kumar was then posted as the Medical Officer, Sadar Hospital, Jehanabad. On 06.11.2010, at 1.30 A.M., he held the autopsy on the cadaver and submitted the post-mortem report (Ext.8). The doctor, on examination, found the following ante mortem injuries present on the victim:-

“Rigor mortis present.

External examination- lacerated wound over left side of the forehead 1/4” in diameter skull cavity deep margin inverted and darkened(wound of entry).

Lacerated wound over right parietal region 3” in diameter skull cavity deep margin everted. Brain matter out. Fracture of skull bones i.e. wound of



exit.

On dissection: Skull bone fracture. Brain matter lacerated and out. Heart chamber empty. Lungs pale. Stomach contains semi digested food. Spleen liver, kidneys pale. Urinary bladder partially full.”

5. In appreciation of evidence, the trial court convicted the appellant in the manner stated above. The other accused persons put on trial along with the appellant were, however, acquitted of the charges considering the material discrepancy/inconsistency in narration of later part of the prosecution case which incriminates those accused persons.

6. Heard Mr. Kanhaiya Prasad Singh, learned Sr. Counsel for the appellant, Mr. S.N.Prasad, APP for the State as well as Mr. Sunil Kumar, counsel for the informant.

7. It has been submitted on behalf of the defence that the trial court relied on the evidence of P.Ws. 1, 3 and 9 to convict the appellant. P.Ws 4,5 and 6 who proclaim themselves as eye-witnesses to the occurrence were, however, not found trustworthy. The evidence of P.Ws 5 and 6 suffers from serious inconsistency/discrepancy. It is the prosecution case that soon after the occurrence several persons had assembled at the place of occurrence. The prosecution only chose a handful of close



relatives to depose in the case. There is no support of the prosecution case from the independent source. The motive to commit the murder of the deceased has not prominently surfaced during the trial. In this connection, he drew our attention to the examination-in-chief of P.W.9 wherein he said that his uncle had deposed in the case against him and, therefore, the appellant had committed the crime. Referring to the evidence of P.W.2, he submits that he has accepted of having deposed against the appellant. If this was the motive then the main target was P.W.2 and not the deceased. Arguing further, it has been submitted that there is a counter case lodged by one of the co-accuseds of the case namely Ramashish Singh with respect to the present incident wherein P.Ws 2,4,8 and 9 (informant) have been arrayed as accuseds. To support the said contention, the defence produced Ext. A which is the certified copy of the complaint lodged by Ramashish Singh with respect to the said incident which was later treated as an FIR. Referring to the evidence of the I.O. (P.W.10), he would submit that it was the appellant who had called the I.O. complaining about the indiscriminate firing being resorted to by the present prosecution side. Lastly, he has criticized the finding of guilt recorded by the trial court contending that the prosecution case gets completely disapproved by the objective finding of the



doctor (P.W.11).

8. Mr. Prasad, the counsel for the State as well as the informant, however, supported the impugned judgment. It is urged that the prosecution case broadly can be separated in two parts. The first part relates to the causing fatal injury to the deceased by fire-arm by the appellant whereas the second part of the occurrence relates to the participation of other accused persons describing the manner in which they, too, played a role in attempting to cause injury to other witnesses and creating a scene of terror by opening indiscriminate firings, firstly, at the place of occurrence and thereafter from the rooftop of their house. The trial court appreciated the evidence of P.Ws 2,4,5 and 6 in respect of the second part of the prosecution case and failed to notice that they were consistent insofar as the first part of the prosecution case is concerned. P.W. 3 is not directly related to the informant. P.W. 1 has not been condemned as an interested witness. Although P.W.1 is not an eye-witness to the actual assault inflicted on the victim by the appellant, but has narrated the second part of the prosecution case. His evidence proves the time and place of occurrence. P.W.7, to some extent, proved the presence of the deceased at the place of occurrence. His evidence proves the place of occurrence and the time of occurrence. They also submitted that



the prosecution case gets full support from the objective finding of the doctor. The guilt of the appellant is well-proved by the ocular account of the prosecution case described by P.Ws 2,3,5,6 and 9.

9. In the light of the rival contention, the Court has to examine whether the prosecution is able to prove the charge against the appellant by reliable evidence. Our consideration would begin with the objective findings of the doctor. The wound of entry found on the left forehead/temple had blackening edges. Harping on the said finding, it has been argued with much emphasis that the prosecution case gets totally disapproved. We have carefully examined the evidence on record. P.W. 2 has stated about the firing by the appellant from a distance of 10-12 feet whereas P.W.9 (informant) has estimated the distance as 06 cubits from where the firing was made by the appellant from his rifle. The Doctor (P.W.11) has opined that such injury was possible if fired from the distance of 3-4 cubits. Law is well-settled that unless the oral evidence is totally irreconcilable with the medical evidence, the oral evidence shall have primacy. What is deposed in court by eye witness is of greater significance. Only when the contradiction between the two is so extreme that the medical evidence completely rules out all possibilities of the ocular evidence being true then the ocular evidence is liable to be



disbelieved. In the case at hand, the estimated distance of firing given by P.W.9 deposing several years after the occurrence completely fits in the prosecution case. The opinion of the doctor expressed in the post-mortem report is reconcilable. The law on this aspect is crystallized beyond cavil. In case of contradiction between the two i.e. oral evidence and the medical evidence the court shall accept the oral evidence given in court if found trustworthy. This is for the simple reason that the opinion of the doctor is not an evidence. It is advisory in nature. The Court has to judge the entire attending circumstance(s) to appreciate the opinion of the expert. The submission of the defence to discredit the prosecution case on this score does not appear to be well substantiated.

10. Another plank of the argument of the defence is that the prosecution has not presented the independent witness(s) to prove the case, particularly when the occurrence was committed on the road in the midst of the village and the evidence is replete to show that several persons had assembled at the place of occurrence. P.W. 1, in our opinion, is an independent witness. He appears to be truthful as he claims to have reached the place of occurrence after the assault already made on the victim by the appellant. He has testified that soon after the hearing of the first



shot of firing, he reached near the house of the appellant to find the deceased Gaurav Kumar Sharma having received gunshot injury and lying in a pool of blood on the road. The informant and P.W. 3 were present weeping near the deceased. He could also notice the appellant standing inside the boundary wall of the house armed with a rifle. Immediately thereafter, P.W.2 and P.W.5 reached the place of occurrence. Subsequently, he has narrated the second part of the prosecution case with which we are not much concerned in this case. He is the witness to the arrest of the appellant immediately after the occurrence from his house by the I.O. (P.W.10). We have carefully gone through his cross-examination. His statement was recorded by the I.O. on the following day. No contradiction much less material contradiction has been elicited by the defence in his entire cross-examination. The evidence of P.W. 1 who is unrelated to the prosecution extends assurance to the truthfulness of the prosecution case presented by the prosecution. At this juncture, we may notice the evidentiary value of P.W.7 Pankaj Sharma, another independent witness. Although he is a hearsay witness having not seen the occurrence but his deposition establishes the presence of the victim on the road leading to his village Pariawan on the relevant date and time of the occurrence, as propounded by the prosecution.



11. P.W.3 is not directly related to the informant. During the relevant time, he was walking along the road with the informant when the deceased was also going along the road few paces ahead of them. Incidentally, it may be noticed that the house of the informant was situated not far from the house of the appellant. This witness has stated that as soon as Gaurav Kumar (deceased) walking ahead crossed the pyne (channel) bifurcating the two village and reached near the house of the appellant in village Pariawan, the appellant fired at him which caused injury in his temple/forehead resulting in his instantaneous death. In a bid to save him, he along with the informant leaned over the body of the victim and started crying. Having said so, he proceeded to describe the second part of the prosecution case wherein other accuseds (since acquitted) had also participated by resorting to indiscriminate firings. On Hulla, Nawlesh Sharma (P.W.5), Abahay Kumar (P.W.4) and Sanjay Kumar (P.W.2) along with several other villagers had immediately reached the place of occurrence. We have carefully gone through his cross-examination contrasted with the the relevant part of the cross-examination of the I.O. (P.W.10) and found their evidence reliable insofar as the first part of the prosecution case is concerned wherein the appellant emerged from the precinct of his house and fired at the



deceased from a close distance.

12. Counsel for the defence has submitted that P.W.3 in course of investigation had made a different statement. On perusal of his evidence, it is seen that the contradiction elicited by the defence is with respect to a fact having no material bearing on the case. The evidence of P.W.3 remains untarnished. The informant (P.W.9) was also walking down the road along with P.W.3. They had earlier met with the deceased who was returning home in the village Pariyawan from the flour mill of P.W.7. He has deposed on the line as deposed by P.W. 3. He has testified to the effect that as soon as Gaurav Kumar (deceased) reached near the south east corner of the boundary wall of the appellant Dharmendra Kumar close to the electric pole and was about to take turn towards his house when the appellant fired at him which hit his occipital part. He fell down and started yelling. He along with P.W. 3 rushed to him and tried to cover him in order to save him from further assault. On the cry raised by him the villagers including Vijay Prasad Sharma (P.W.1), Abhay Singh (P.W.4), Nawlesh Sharma (P.W.5) and Sanjay Singh (P.W.2) soon arrived and witnessed the occurrence. The police had arrived soon after the incident at the place of occurrence when the written report was promptly submitted. The I.O. started a combing operation and



arrested the appellant from his house. Prompt lodging of the case, in the case in hand, rules out the possibility of confabulation. He also seized double-barreled gun, rifle and live cartridges kept in the room of the house of the appellant. We have also carefully examined the evidence of P.W. 4. His evidence supports the prosecution case and the involvement of the appellant in the crime. It has been stressed before us by the defence that this witness has stated about the arrival of the other witnesses 10-15 seconds after his arrival and, as such, the evidence of P.Ws. 2,6 5 and even P.W. 9 (informant) cannot be accepted as eye-witnesses. On close perusal of his evidence we are unable to accept the said contention. He only stated 10-15 seconds by way of estimation. In his examination-in-chief, he has clearly stated about the informant (P.W.9) and P.W. 3 seen by him following the deceased.

13. The trial court has not placed reliance on P.Ws 2,4,5 and 6 considering the evidence of P.W.1. P.W.1 has not deposed on the first part of the occurrence. He narrated the occurrence after the first assault made by the appellant on the deceased. The trial court found some material discrepancy/inconsistency in the evidence of these P.Ws only in relation to the involvement of the other accuseds facing the trial along with the present appellant which relate to the second part of the incident/occurrence. So far as the



first part of the occurrence wherein the appellant had fired at the deceased causing injury in his temple/forehead has been supported in full at least by P.Ws 5 and 6.

14. In order to discredit the prosecution case, it has been submitted by the defence that there was no motive on the part of the appellant to commit the murder of the deceased. The motive is not an essential ingredient of the crime. If the prosecution has come out with a motive for commission of crime the court insists on proving the same at the trial. In face of the ocular account presented by the witnesses whose evidence inspire confidence of the court, non-proving of the motive would not be a circumstance grave enough to suspect the prosecution case.

15. Noticeably, in the present case, many relevant circumstances which the prosecution is required to prove in order to sustain the conviction have been stated by the defence when they rely on Ext. A which is a copy of the complaint lodged by one of the co-accused against P.Ws 2,4 and 9 in relation to the present incident. While recording the statement of the appellant under section 313 Cr. P.C., the appellant has referred to the said case stating the presence of the informant, P.Ws 2, 4 and 3. The defence taken by the appellant and disclosed in his statement under section 313 Cr. P.C. substantiates the prosecution case on material



aspects.

16. Having gone through relevant evidence in the light of the criticism(s) made by the defence, the Court has no hesitation to hold that the evidence adduced at the trial by the prosecution goes a long way to prove the charge(s) against the appellant beyond shadow of reasonable doubt.
17. Resultantly, the appeal is found devoid of merit. It is accordingly dismissed.

(Kishore Kumar Mandal, J)

I Agree (Madhuresh Prasad, J)

HR/-

AFR/NAFR	NAFR
CAV DATE	8.9.2017
Uploading Date	15.09.2017
Transmission Date	15.09.2017

