

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No. 467 of 2015

Arising Out of PS. Case No.-41 Year-2006 Thana- Parsa District- Saran

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1. Durga Devi @ Durgawati Devi W/o- Late Suresh Tiwari
resident of Village- Parsa, P.S.- Parsa, District- Saran
(Chapra).
 2. Nirmal Tiwari S/o - Late Suresh Tiwari, resident of
Village- Parsa, P.S.- Parsa, District- Saran (Chapra).

... .. Appellants

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellants : Mr. Ajay Kumar Thakur, Advocate
with Mr. Md. Imteyaz Ahmad, Advocate
Mr. Nilesh Kumar, Advocate
Mr. Ritwaj Ramon, Advocate
Ms. Swati Sinha, Advocate

For the State : Mr. Ajay Mishra (A.P.P.)

For the Informant : Mr. Ajay Kumar Sharma, Advocate

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 26-02-2018

Two appellants, who are mother and son, have approached this Court under Section 374 (2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') against their judgment of conviction and sentence in Sessions Trial No. 181 of 2011/Sessions Trial No. 418 of 2014 (arising out of Parsa P.S. Case No. 41 of 2006) passed by Sri Durgesh Mani Tripathi, learned Additional Sessions Judge 11th, Saran at



Chapra (hereinafter referred to as the 'Trial Judge'). By the said judgment, both the appellants on 30-03-2015 were convicted for offence committed under Sections 302/34 of the Indian Penal Code, 1860 (for short 'I.P.C.') and by order of sentence dated 31-03-2015, both the appellants were directed to undergo rigorous imprisonment for life and pay a fine of Rs. 10,000/- (ten thousand) each. In default of payment of fine, they were further directed to undergo simple imprisonment for one year.

2. Short fact of the prosecution case is that on 03-07-2006 at 12:15 PM in Patna Medical College & Hospital (for short 'P.M.C.H.') Emergency Ward, one Assistant Sub-Inspector of Police B.N.Singh of Pirbahor Police Station recorded *fardbeyan* of Sheela Nath Tiwari (P.W.3). In the *fardbeyan*, the informant disclosed that on the same date i.e. 03-07-2006 in the morning at 6.30 hrs., his son Ravi Ranjan Kumar, after playing cricket, was returning home. In the meanwhile, co-villager of the informant Durga Devi (appellant no. 1) caught hold of son of the informant and son of Durga Devi namely Nirmal Tiwari (appellant no. 2) gave *lathi* blow on the head of son of the informant and Akhilesh Tiwari



(another son of appellant no. 1) started assaulting on the head and other portion of his son. His son started crying and fell down. Thereafter, Mukti Narayan Mishra (not examined) son of late Basudeo Mishra arrived there. After noticing that Mukti Narayan Mishra was coming, the accused persons fled away. In the meanwhile, after hearing alarm, the informant went there and saw his son Ravi Ranjan Kumar, aged about 17 years, was lying unconscious and squirming. The informant, with the help of other co-villager, carried the injured son on a cot to Parsa Hospital, Chapra, where doctor, after initial treatment, referred the injured to P.M.C.H., Patna. On government ambulance, the injured was brought to the P.M.C.H., where after examining his son, the doctor declared him dead. The informant claimed that due to assault given by the accused persons by *lathi* and *danda*, his son died. The reason for the occurrence was given by the informant that there was land dispute. He further claimed that the occurrence was witnessed by Mukti Narayan Mishra (not examined) and other number of persons, who will explain, if examined. He claimed that injured was assaulted with intent to kill him. The *fardbeyan* was read by him and after finding it to be correct,



the informant put his signature. Though, *fardbeyan* was recorded on 03-07-2006 at 12:15 P.M., in the case, formal F.I.R. was drawn on 06-07-2006 at 11:30 A.M., vide Parsa P.S. Case No. 41 of 2006 for offence under Sections 302/34 of the I.P.C. against:

1. Durga Devi, wife of late Suresh Tiwari (appellant no. 1),
2. Nirmal Tiwari, son of appellant no. 1 (appellant no. 2) and
3. Akhilesh Tiwari, son of app. no. 1 & brother of appellant no. 2.

3. After drawing formal F.I.R., investigation was conducted by the police and thereafter, on 18-12-2006, first chargesheet was submitted against Akhilesh Tiwari under Section 302/34 of the I.P.C. and thereafter, on 21-12-2006, cognizance order was passed by the learned Magistrate. In the case, on 31-07-2007, supplementary chargesheet was submitted against both the appellants and thereafter, on 28-02-2011, after completion of formality under Section 207 of the Cr.P.C., the case was committed to the court of sessions and case was numbered as Sessions Trial No. 181 of 2011. On 23-04-2011, joint charge under Section 302/34 of the I.P.C. was framed against both the appellants and thereafter, to prove the case on behalf of the prosecution, altogether 5 witnesses were examined. Out of 5 witnesses:



P.W.1 Madhukant Singh is brother-in-law of the informant i.e. husband of the sister of the informant,

P.W.2 Vidyawati Devi, wife of informant and mother of the deceased,

P.W.3 Sheela Nath Tiwari, informant and father of the deceased,

P.W.4 Dr. Pankaj Kumar, who conducted *post-mortem* examination on the dead body of the deceased, and

P.W.5 Raj Kumar Bhagat, who was an Advocate Clerk, and proved the formal F.I.R.

4. After conclusion of the prosecution evidence, evidence and circumstances collected against appellants were explained to the appellants and their statement under Section 313 of the Cr.P.C. was recorded. However, in the case, no defence evidence was laid and finally, by the impugned judgment, both the appellants were convicted and sentenced.

5. Sri Ajay Kumar Thakur, learned counsel for the appellants, by way of referring to evidence, has argued that it was a case of 'no evidence', but subsequently, with some oblique motive, the entire family, which was of three members, were implicated in the present case. It has been



argued that the appellants side were *patidar* (पटीदार) of informant side and the appellants' land was just behind the land of the informant and admittedly, there was land dispute in between the parties. It has been argued that on examination of the evidence of P.W.3/informant, it is evident that while informant, after hearing cry, had reached at the place of occurrence, occurrence had already come to an end and it appears that said occurrence was seen by one Mukti Narayan Mishra, however; to the reasons best known to the prosecution, the said witness was withheld and he was not examined as prosecution witness. It has also been argued that it appears that the deceased had received the said injuries while he was playing cricket or he might had been assaulted by some other persons while playing cricket, but subsequently, a story was developed, as if, entire family members of the appellants had committed the crime. It has also been argued that the evidence of so called eye-witness i.e. P.W.1 Madhukant Singh and P.W.2 Vidyawati Devi (mother of the deceased) may not be relied upon, as eye-witnesses, since the informant/P.W.3 in his *fardbeyan* had categorically stated that after hearing cry, he reached to the place of occurrence and the



occurrence was seen by Mukti Narayan Mishra and it appears that everything was informed by Mukti Narayan Mishra to the informant. Had P.W.1 and P.W.2 were present at the time of occurrence or seen the occurrence, the informant would have categorically stated that they were also present, but the informant had stated that one Mukti Narayan Mishra was present with other co-villager, however; neither Mukti Narayan Mishra nor any other co-villager had come forward to support the prosecution case. It has also been argued that though, deceased was having serious lacerated wound on his head, at the place of occurrence, no blood mark was noticed and this fact has been admitted by all the three witnesses, who had come forward to claim as witness. According to Sri Thakur, at the place of occurrence, which was not a field rather a road in between the house of informant and appellants, there was every possibility of finding blood mark. He submits that the entire prosecution evidence is liable to be overlooked, in view of the fact that prosecution has not been able to establish place of occurrence. He, by way of referring to suggestions given to witnesses, has argued that occurrence had taken place at different place, not at the place where it has



been alleged by the informant. It has also been argued that during trial, since investigating officer was not examined, the defence case has seriously been prejudiced and they were prevented from drawing attention of the investigating officer to previous statement made by the so called eye-witnesses before the police under Section 161 of the Cr.P.C. He further submits that in absence of investigating officer, the defence was further prevented from asking any question to create doubt on the place of occurrence. By way of referring to evidence of P.W.4, Dr. Pankaj Kumar, who conducted *post-mortem* examination on the dead body of the deceased, it has been argued that the doctor himself had accepted that injury found on the forehead of the deceased was possible by cricket ball. It has also been argued that though the informant (P.W.3) or other witnesses had stated that while appellant no. 1 was holding the deceased, other two accused persons had assaulted deceased by giving blow of *lathi*, the deceased would have received some other injuries also, but mainly the deceased had got injury on his forehead, ofcourse, there was one lacerated injury on the occipital region of the deceased. Accordingly, in view of such evidence, as per learned counsel for the



appellants, the prosecution has not been able to establish its case beyond all reasonable doubt and as such, judgment of conviction and sentence is liable to be set aside.

6. Sri Ajay Mishra, learned Addl. Public Prosecutor, controverting the submission of learned counsel for the appellants, has taken the Court to the inquest report i.e. **Ext. 2**. He has specifically referred to column no. 5 of the inquest report, which speaks that on the person of the deceased, there was no noticeable injury, however; on forehead, there was swelling only. Taking clue from paragraph 5 of the inquest report, which was prepared on the *verandah* of the emergency ward of P.M.C.H., it has been argued that this was the reason that at the place of occurrence, there was no mark of blood and as such, all the witnesses have categorically stated that at the place of occurrence, there was no mark of blood. He submits that keeping in view the injury found on the person of the deceased as well as consistent evidence of eye-witnesses, there is no reason to doubt about the place of occurrence. He further submits that witnesses, who have been examined as eye-witnesses, have supported the prosecution case and on the



basis of such evidence, the learned Trial Judge has rightly passed judgment of conviction.

7. Sri Ajay Kumar Sharma, learned counsel for the informant has argued that evidence of P.W.1 Madhukant Singh clarifies that he was the first person, who reached at the place of occurrence after hearing cry of the son of the informant. He noticed entire occurrence and only after his arrival, even Mukti Narayan Mishra had arrived and other witnesses had also come, so on the basis of evidence of P.W.1 itself, the prosecution has been able to establish its case. Besides evidence of P.W.1, P.W.2 (mother of the deceased) and P.W.3 (informant and father of the deceased) have also supported the prosecution case. According to Sri Sharma, learned counsel for the informant, in view of nature of injury found on the person of the deceased, rightly on the place of occurrence, no mark of blood was noticed.

8. Besides hearing learned counsel for the parties, we have also examined the entire evidence i.e. oral and documentary evidence and after going through the same, *prima facie*, we are of the view that prosecution has not been able to establish its case beyond all reasonable doubt. Before



examining the evidence of so called eye-witnesses i.e. P.W.1, P.W.2 and P.W.3, it would be necessary to cursorily examine the *fardbeyan*, which is **Ext. 1**.

9. On going through the *fardbeyan*, one thing is clear that while informant reached at the place of occurrence, entire episode had already come to an end and informant, as per his version, was informed by Mukti Narayan Mishra regarding manner of occurrence. In the *fardbeyan*, he has not even whispered as to whether while the informant reached besides Mukti Narayan Mishra, whether there were any other his family members or not. In normal course, after the arrival of the informant, had there been presence of his own relative i.e. P.W.1 or P.W.2, instead of referring to name of Mukti Narayan Mishra, the informant would have mentioned the name of P.W.1 and P.W.2 in the *fardbeyan*. Non-mentioning of those fact, particularly presence of P.W.1 by the informant makes it clear that while informant arrived P.W.1 was not available. In any event, such circumstances create serious doubt regarding presence of P.W.1 Madhukant Singh. On examination of evidence of P.W.1 Madhukant Singh, it appears that he was the first person, who arrived at the place of occurrence and only



thereafter, P.W.2 and P.W.3 had arrived there. This stand is itself in conflict with the evidence of P.W.3, who is none else but father of the deceased. It is not a case that at the place of occurrence itself *fardbeyan* was got recorded and in haste, the informant might had missed to refer the name of P.W.1, but in the case, occurrence had taken place at 6:30 in the morning in the district of Saran, whereas, *fardbeyan* was recorded on the *verandah* of Emergency Ward of P.M.C.H., Patna and in his *fardbeyan*, the informant (P.W.3) has not at all whispered about the presence of P.W.1. Accordingly, in view of evidence of P.W.3 as well as fact disclosed in the *fardbeyan*, it would not be safe to place much reliance on the evidence of P.W.1. Moreover, P.W.3 father of the deceased is not an eye-witness to the occurrence. Similarly, his wife P.W.2 Vidyawati Devi also appears to be not an eye-witness. As per the prosecution case, the occurrence was witnessed by Mukti Narayan Mishra, but to the reasons best known to the prosecution, the said witness was never produced during the trial.

10. Moreover, on examination of evidence of P.W.1, 2 and 3, it is evident that they were contradicted to their previous statement and suggestion was given that they had not



given such statement, which were disclosed by them during evidence. However, in absence of examination of investigating officer, the defence was prevented from drawing attention in respect of statement of witnesses recorded under Section 161 of the Cr.P.C. In the case, no explanation has been given as to why the investigating officer was not produced for being examined, as prosecution witness.

11. After the death, on same date i.e. on 03-07-2006, *post-mortem* examination was conducted by Dr. Pankaj Kumar, who has been examined as P.W.4. Dr. Pankaj Kumar on 03-07-2006 was posted as Lecturer in Department of Forensic Medicine, P.M.C.H. and he noticed following facts :-

“1. Swelling 2”x 1½ ” Rt. forehead.

2. Hematoma was seen with scalp on Rt. frontal, parietal temporal and Lt. temporal parietal region of skull.

3. One comunitated fracture 7½” x 8” Rt. frontal parietal and left temporal parietal region of skull.

Brain matter was coming out and was found thoroughly lacerated. Subdural hematoma was seen on both sides of brain.

Opinion:(i) Time since death - 6 to 24 hours approx.

(ii) Cause of death - Head injury.

(iii) Nature of violence – Hard & blunt substance & its impact.”



He also proved *post-mortem* report, which was marked as **Ext. 3**. In cross-examination in respect of injury no. 1, doctor has stated that the injury no. 1 was possible by cricket ball. So far as injury no. 2 & 3 are concerned, he had denied the suggestion that such injuries could be found on fall of the injured on cricket pitch.

12. On examination of the evidence of P.W.4 as well as *post-mortem* examination report, the suggestion that deceased had received injury while playing cricket may not be outrightly rejected. Meaning thereby that the case of the prosecution that the deceased was done to death by *lathi*, *danda* etc. may not be accepted as *Gospel truth*.

13. Another point for raising suspicion in the prosecution case is that in the case, *fardbeyan* was recorded at 12:15 PM on the date of occurrence itself i.e. 03-07-2006, but formal F.I.R. was shown to be drawn on 06-07-2006, however; no explanation has been given by the prosecution regarding drawing formal F.I.R. much belatedly. At the same time, on examination of evidence of P.W.1, it is evident that the investigating officer had examined him on 06-07-2006. The evidence of P.W.1 may also not be accepted due to the reason



that he was close relative of the informant and he had claimed that occurrence had taken place in his presence and he remained in the same village, but he did not bother to inform the police station on the same date. In normal course, the relative P.W.1, after noticing the occurrence, would have immediately rushed to the police station for giving such information, but no such step was taken. In the present case, case has been initiated only after recording *fardbeyan* in the P.M.C.H., Patna. Accordingly, the evidence of P.W.1 may not be relied upon. Moreover, during evidence, without any explanation, one of the main witness namely Mukti Narayan Mishra was not examined by the prosecution. Besides non-examination of Mukti Narayan Mishra during trial, none of the villagers or independent witness has come forward to support the prosecution case. In such situation, it would not be appropriate to approve the judgment of conviction and sentence only on relaying upon the evidence of P.W.1, 2 and 3.

14. After going through the entire evidence, we are of the considered opinion that the prosecution has not been able to establish its case beyond all reasonable doubt and as such, by way of extending benefit of doubt, it is necessary to



interfere with the judgment of conviction and sentence.

15. Accordingly, the judgment of conviction dated 30-03-2015 and order of sentence dated 31-03-2015 passed by Sri Durgesh Mani Tripathi, learned Additional Sessions Judge - 11th, Saran, Chapra in Sessions Trial No. 181 of 2011/Sessions Trial No. 418 of 2014 (arising out of Parsa P.S. Case No. 41 of 2006) is, hereby, set aside and appeal is allowed.

16. Since the appellant no. 2 Nirmal Tiwary is in custody and judgment of conviction and sentence has already been set aside, it is, hereby, directed to release him forthwith, if not wanted in any other case.

17. So far as appellant no. 1 Durga Devi @ Durgawati Devi is concerned, since she is on bail and judgment of conviction and sentence has been set aside, she is discharged from the liability of bail-bond.

(Rakesh Kumar, J.)

(Arvind Srivastava, J.)

Anay

AFR/NAFR	AFR
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