

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Criminal Appeal (DB) No.448 of 1994**

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Md. Mansoor, S/O Late Md. Ibrahim, resident of Chauka Fathepur, P.S. Sabour, District, Bhagalpur.

... .. Appellant/s

Versus

The State of Bihar.

... .. Respondent/s

=====

with  
**Criminal Appeal (DB) No. 482 of 1994**

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Md. Riyaz, son of Md. Mansoor, resident of Choka Fatehpur, P.S. Sabour, Distirct- Bhagalpur.

... .. Appellant/s

Versus

The State of Biahr.

... .. Respondent/s

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**Appearance :**

(In Criminal Appeal (DB) Nos. 448 of 1994 and 482 of 1994)

For the Appellant/s : Mr. Ramjit Sahay, Advocate.

Mr. S.M. Ashraf, Advocate.

For the State : Mr. Dilip Kumar Sinha, A.P.P.

Mr. Shivesh Chandra Mishra, APP

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**CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA**

**and**

**HONOURABLE MR. JUSTICE RAJENDRA KUMAR**

**MISHRA**

**ORAL JUDGMENT**

**(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA)**

**Date : 22-03-2018**

1. Both the above stated Criminal Appeals have arisen out of common Judgment of conviction and sentence order dated 01.09.1994 and 03.09.1994, respectively, passed by the 2<sup>nd</sup>



Additional Sessions Judge, Bhagalpur, in Sessions Case No. 427 of 1993 arising out of Sabour P.S. Case No. 142 of 1991.

Appellant, Md. Riyaz, in Criminal Appeal (DB) No. 482 of 1994 has been convicted for the offence punishable under Section 302 of the Indian Penal Code and accordingly, has been sentenced to undergo rigorous imprisonment for life for the offence punishable under Section 302 of the Indian Penal Code but no separate sentence was awarded to him for the offence punishable under Section 27 of the Arms Act.

Similarly, appellant, Md. Mansoor, in Criminal Appeal (DB) No. 448 of 1994 has been convicted for the offence punishable under Section 302/34 of the Indian Penal Code and has been sentenced to undergo rigorous imprisonment for life for the above stated offence of Section 302/34 of the Indian Penal Code.

2. P.W.6, namely, Md. Wali, who happens to be the father of the deceased, gave his Fradebyan to P.W.9, Suniram Hembram, the then Station Officer of Industrial (Sabour) Police Station, on 29.06.1991, at about 9.45 P.M. at Mansarpur Jhurkuriya near railway line to this effect that on the same day, at about 5.30 P.M., his son, Md. Sahid, returned to his home. In the meantime, appellant, Md. Riyaz, in Criminal Appeal (DB) No. 482 of 1994 came there and took him towards railway line on the



pretext of some work. The son of P.W.6 along with Md. Riyaz went towards railway line but even after a lapse of one hour, he did not return. Thereafter, P.W.6 went towards railway line and reached near betel shop of P.W.1, Md. Mokim, in search of his son, then he saw that the appellant, Mansoor, in Criminal Appeal (DB) No. 448 of 1994 and one F.I.R. named accused, Md. Nipiya had caught his son. He asked his son about the matter but, in the meantime, appellant, Md. Riyaz, shot fire putting country made pistol on the chest of his son. He further stated that his son fell down on the earth and died then and there. He raised alarm but the above stated persons fled away from there. The aforesaid occurrence was witnessed by P.W.1, Md. Mokim. He started weeping and crying, which attracted P.W.7, Md. Chotu, Md. Jakir (not examined), Md. Javed (not examined), Md. Jani (not examined) and Md. Israfil (not examined), who came there and found the deceased lying dead. He claimed that information regarding the aforesaid occurrence was given to Police. The reason behind the alleged occurrence is said to be demand of dues money from Md. Riyaz. P.W.6 further claimed that one or two days prior to the alleged occurrence, a hot exchange of words had taken place between the deceased and Md. Riyaz on the point of non payment of dues amount.



3. On the basis of the aforesaid Fradbeyan, Sabour P.S. Case No. 142 of 1991 for the offence punishable under Section 302/34 of the Indian Penal Code was registered on 29.06.1991 and the aforesaid Fradebyan was forwarded to Sabour Police Station, which was received in Sabour Police Station on the same day, i.e., on 29.06.1991. However, the formal F.I.R. was drawn up on 29.06.1991 at about 11 P.M. The formal F.I.R. and Fradebyan were dispatched to the concerned court on 30.06.1991, but the formal F.I.R. and the Fradbeyan were put up before the learned Magistrate on 05.07.1991.

P.W.9, Suniram Hembram, took the charge of investigation. He visited the place of occurrence and recorded the statements of witnesses, seized the blood stained earth and other relevant articles, but before completion of investigation, he handed over the charge of investigation to P.W.8, Ramgopal Laheri, who after completion of investigation, submitted the charge sheet against the appellants and F.I.R. named accused, Md. Nipiya. The cognizance of the offence was taken in usual course and the case was committed to the court of sessions and, accordingly, the appellants were put on trial. However, in course of trial, one accused, namely, Md. Nipiya, absconded, as a result of which, his case was separated. The appellants were charged for the offence



punishable under Section 302/34 of the Indian Penal Code and Section 27 of the Arms Act.

4. In course of trial, prosecution examined, altogether, ten witnesses and also got exhibited the some documents. The statements of the appellants were recorded under Section 313 of the Cr.P.C., in which, they denied the prosecution story. The appellants also got examined three defence witnesses to prove the plea of alibi.

The learned trial court after scrutinizing and analyzing the evidence available on the record, convicted the appellants in the manner, as stated above, having relied upon the testimonies of P.W.6, P.W.7, P.W.9 and P.W.10.

5. Learned counsel appearing for the appellants assailed the impugned Judgment of conviction and sentence order, arguing that the learned trial court failed to appreciate the evidence properly, as the learned court below did not take any note to this fact that according to prosecution case itself, deceased had left his home with the appellant, Md. Riyaj, before one hour in the evening of the alleged occurrence and there was no occasion for P.W.6 to make search of the deceased. Moreover, had the appellants any intention to kill the deceased, they would have not waited near about one hour for killing of the deceased. As a matter



of fact, the deceased was a man of criminal antecedent and was killed by some unknown persons, but taking advantage of killing of the deceased, P.W.6 implicated the appellants in false case and that's why P.W.1, Md. Mokim, who had betel shop near the place of occurrence and was the first person who reached at the place of occurrence, did not disclose the name of the appellants nor found the P.W.6 present over the place of occurrence. He further submits that, no doubt, P.W.1 has been declared hostile by the prosecution, but merely, on the ground that the aforesaid witness has been declared hostile, his entire testimony cannot be rejected.

In support of his contention, he referred decisions reported in AIR 1991 SC 1853, AIR 1976 SC 294 and 1991(2) PLJR 441. In the aforesaid decisions, the Apex Court of this Country has held that the evidence of hostile witness cannot be treated as effaced or washed off record altogether and same can be accepted to extent their version is found to be dependable on careful scrutiny thereof. It is admitted position that the statement of a hostile witness cannot be rejected only on the ground that the said witness has been declared hostile, but the Apex Court of this Country in several decisions have already held that the statement of hostile witness should be examined with care and cautions and



the statement of hostile witness can only be relied upon, if the same is corroborated by other evidences.

Learned counsel for the appellants further submits that the witnesses made contradictory statements and, as a matter of fact, except P.W.6 not a single witness claimed to have seen the appellants committing the murder of the deceased and so far as P.W.6, is concerned, his statement is full of contradiction and is not supported by any independent person. He further submits that so far as P.W.7 is concerned, admittedly, P.W.7 is relative of P.W.6 and, moreover, P.W.7 only claimed to this extent that he had seen the appellants fleeing from the place of occurrence.

6. On the other hand, learned Additional Public Prosecutor supported the impugned Judgment of conviction and sentence order, arguing that P.W.6 claimed before the trial court that he had seen the appellants and co-accused, Md. Nipiya, committing the murder of the deceased and apart from this, P.W.5, mother of the deceased, also named the appellants, claiming that after the alleged occurrence when she reached over the place of occurrence, P.W.6 disclosed the name of appellants. Apart from this, statement of P.W.6 is corroborated by the statement of P.W.7, who claimed that he had seen the appellants fleeing from the place of occurrence and at that time appellant, Md. Riyaz, was carrying



the country made pistol in his hand. He further submitted that the Doctor (P.W.10) found one firearm injury on the chest of the deceased and the postmortem report corroborates the statement of P.W.6. He also submits that P.W.9 proved the place of occurrence and, therefore, there was no room to doubt the prosecution case and the learned trial court rightly convicted and sentenced the appellants.

7. Having heard the contentions of both the parties, we went through the record. As we have already stated that, altogether, ten witnesses were examined by the prosecution in course of trial. Out of them, P.W.1 Md. Mokim has been declared hostile and this witness accepted to this extent that on the alleged date of occurrence he was at his betel shop and heard the noise towards West side of his shop and when he went there, he saw the deceased lying dead. This witness also stated that he heard the sound of firing, but he had not found any person present there. The attention of this witness was drawn towards his previous statement, but he denied to have made such statement before the police. On being cross-examined by the defence, this witness stated that his betel shop was situated towards East side of the place of occurrence. He also stated that there were 3 to 4 houses between his shop and place of occurrence. He, further, stated that



the place of occurrence was not visible from his shop. Perusal of testimony of P.W.1 goes to show that there is nothing in the testimony of this witness in support of prosecution case.

8. P.W.2, Md. Abed is witness of inquest report, whereas P.W.3 Md. Harun is the witness of seizure list and the blood stain earth had been seized in presence of P.W.3.

9. P.W. 4, Md. Akram, stated that on the alleged date of occurrence, he heard noise regarding killing of Sahid and having heard the aforesaid noise, he went to the place of occurrence, where he found P.W.1, P.W.3, P.W.7 etc. present there. The police were also present and in his presence the blood stained earth was seized by the police and police prepared the seizure list, upon which, he put his signature. This witness, at paragraph 4 of his cross-examination, stated that he had reached over the place of occurrence at about 7 P.M. and Md. Chotu, Md. Arari, Md. Jakir etc. had accompanied him. This witness also stated that when he reached near the place of occurrence, he saw P.W.6 was sitting near the dead body of his son.

10. P.W.5, Bibi Khaliza, is the mother of the deceased. This witness stated that deceased had come to his home at about 5 P.M. and at the same time, appellant, Riyaz, took him from his house. She further stated that when her son did not return



to home even after one hour, her husband went in search of her son and, in the meantime, she heard that her son was lying dead near railway line and, thereafter, she went there, where she saw her son lying dead near the railway line. She further claimed that her husband disclosed that appellants and Md. Nipiya had committed the murder of the deceased. She further disclosed that appellant, Riyaz had taken Rs.120/- from Sahid and when deceased, Md. Sahid demanded the aforesaid money from Md. Riyaz, hot exchange of words had taken place in between them prior to the alleged occurrence and that was the reason behind the alleged occurrence. She admitted in her cross-examination that it was P.W.1, who had given information to her regarding the death of deceased. The deposition of this witness goes to show that she is not the eye witness to the occurrence and she went over the place of occurrence after alleged killing of deceased. Moreover, she claimed that her husband (P.W.6) had disclosed the name of appellants.

**11.** P.W.6, Md. Wali, is said to be sole eye witness of the alleged occurrence. Admittedly, P.W. 6 is the father of the deceased and he stated that on the alleged date of occurrence at about 5 P.M. the appellant, Md. Riyaz, took the deceased from his house on pretext of some work, but when, even after, lapse of one



hour his son did not return to his home, he went towards railway line and reached near the betel shop of P.W.1. He noticed that appellant, Md. Manjoor, and co-accused, Nipiya, had caught hold the deceased and appellant, Md. Riyaz was standing there and when he made protest, the appellant, Md. Riyaz, shot fire on the right chest of his son, as a result whereof, Sahid sustained firearm injury and died then and there. This witness further stated that on his alarm, witnesses came there, then he narrated the entire incident. He stated that the police came at the place of occurrence and recorded his statement. This witness has stated in his cross-examination that he went towards railway line alone and he did not meet anyone, while he was going towards railway line. He further admitted that he did not give any information after the occurrence rather unknown person had given information to the police and on that information, police reached over the place of occurrence. He admitted that before arrival of the Daroga Ji, the information to Industrial Police Station had been given. He admitted that Daroga Ji of Barari Polcie Station had come and recorded his statement.

**12.** P.W.7, Md. Chotu, has stated that while he was going, he heard the sound of firing and went towards the place of occurrence where he saw the appellants and co-accused, Md. Nipiya fleeing from there and at that time appellant, Md. Riyaz,



was carrying country made pistol in his hand. He further disclosed that he is the close relative of P.W.6.

**13.** P.W.8, Ramgopal Laheri, and P.W. 9, Suniram Hambram, are police officials and they have stated regarding institution of police case, seizure of blood stained earth and other formalities.

**14.** P.W.10 is Dr. Kailash Jha, who had conducted the postmortem of the deceased. This witness stated that one firearm wound of entry was found on the right side of chest of the deceased. This witness stated that he did not find charring around the wound. He further stated that blackening and charring were possible only, if fire is caused from close range. This witness further admitted that injury found on the person of the deceased reveals that the firing was made from a distance of 4 to 5 feet.

**15.** It would appear from perusal of the evidences of the above stated witnesses that, admittedly, the Fradbeyan of P.W.6 was reocrded on 29.06.1991 and on the same day, Fradbeyan was sent to Sabour Police Station for registration of the police case, where the police case was registered and formal F.I.R. was drawn up on the same day, i.e., on 29.06.1991. Furthermore, it is admitted position that formal F.I.R. was drawn up, on 29.06.1991, at about 11 P.M., and the same was dispatched to the court of concerned



Magistrate on 30.06.1991, but it is surprising enough that the Fradbeyan and formal F.I.R. were put up before the learned Magistrate on 05.07.1991, i.e., after six days delay. No doubt, delay in sending the F.I.R. to the concerned court is not always fatal to the prosecution case and it varies on facts and circumstances of each and every case, but in the present case, P.W.6 admitted in his cross-examination that while he was weeping sitting near the dead body of the deceased, some persons gave information to the Police of Industrial Police Station in respect of the occurrence and, thereafter, police officials of Barari Police Station came there and recorded his statement. P.W.6 also admitted that the police of Sabour Police Station had not come on the place of occurrence. The aforesaid statement goes to show that First Information regarding the aforesaid occurrence was given to the police officials of Industrial Police Station by some unknown person, but prosecution failed to bring the aforesaid information on record and, therefore, it creates doubt about the genuineness of prosecution story, particularly, in the circumstances when the formal F.I.R. and Fradbeyan were put up before the concerned Magistrate after six days of its registration and, therefore, it is obvious that the police had ample opportunity to replace the above stated information by the Fradbeyan of P.W.6.



**16.** In Fradbeyan, P.W.6 claimed that appellant, Md. Riyaz, shot fire on the deceased putting his pistol on the chest of the deceased, meaning thereby the appellant, Md. Riyaz, shot fire on the deceased with close range, but the Doctor has, specifically, stated that the firing of the deceased was made from at the distance of 4 to 5 feet. Although, P.W.6 tried to fill up the aforesaid lacunae when examined before the trial court by stating that the appellant, Md. Riyaz, fired on the deceased and omitted that fire was made by putting pistol on chest of the deceased but the above stated omission is an afterthought step and it appears to us that P.W.6 deliberately omitted the aforesaid fact after perusing the postmortem report. Therefore, in our view, the postmortem report also disbelieves the manner of occurrence as stated by P.W.6 at the first instance when his Fradbeyan was recorded.

**17.** According to prosecution case itself, except P.W.6, none of the prosecution witnesses claimed to have seen the actual killing of the deceased and the testimony of P.W.6 appears to be doubtful on the ground as discussed above and, therefore, in our view, it is unsafe to rely upon the testimony of P.W.6 and furthermore, we are of the view that the appellants are entitled to get benefit of doubt.



18. On the basis of aforesaid discussions, both the above stated Criminal Appeals are allowed and the impugned Judgment of conviction and sentence order dated 01.09.1994 and 03.09.1994, respectively, passed by the 2<sup>nd</sup> Additional Sessions Judge, Bhagalpur, in Sessions Case No. 427 of 1993 arising out of Sabour P.S. Case No. 142 of 1991 are, hereby, set aside. The appellants are acquitted of the charges. The appellants are on bail, therefore, they are discharged from the liabilities of their bail bonds.

(Hemant Kumar Srivastava, J)

( Rajendra Kumar Mishra, J)

Bhardwaj/-

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