

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.549 of 1994

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Musafir Mistry, son of Baleshwar Mistri, resident of village- Khutauni
(Khutauni Chak), P.S.- Nawadah, District- Nawada.

... .. Appellant/s

Versus

The State of Bihar.

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Bharat Lal, Advocate.

For the Respondent/s : Mr. Dilip Kumar Sinha, A.P.P.

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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 : 09-04-2018

1. The sole appellant has been convicted for the offence punishable under Section 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life, vide Judgment of conviction and sentence order dated 07.09.1994 passed in Sessions Trial No. 32 of 1992/170 of 1992 by the Ist Additional Sessions Judge, Nawadah.

2. P.W.6, namely, Sheo Shankar Kumar, gave his Fradbeyan to the Officer-In-Charge of Nawadah Police Station (P.W.11), on 06.07.1992, at about 7 A.M., at Sadar Hospital, Nawadah, in presence of Surendra Kumar and his elder brother,



Saudagar Mistry (P.W.3) to this effect that on 05.07.1992, at about 6.30 P.M., he along with Vijay Rajbanshi (P.W.8), Sitaram Rajbanshi (P.W.1) and some others were sitting at the *Baithika* of Parmeshwar Rajbanshi and Shayam Mahto (P.W.9) was washing his hand at the *Chapakal*. In the meantime, the aforesaid Shayam Mahto uttered that the noise of *Chor-Chor* was coming from northern side and having heard the aforesaid noise, he as well as above stated persons ran towards Asharhi Bandh and saw that the appellant was assaulting his brother by means of lathi. In the meantime, several villagers assembled there and snatched lathi from the hands of the appellant. His brother became unconscious and he was taken to Sadar Hospital, Nawadah, by Sahay Mahto, Dowarika Badhai, Anil Rajbanshi, Saudagar Mistry and Baleshwar Mistry. However, his brother died on 06.07.1992, at about 5 A.M., in course of his treatment. The informant claimed that the appellant had assaulted the deceased, Balmiki Mistry with intention to kill him. P.W.6 also claimed that one week ago a quarrel had taken place between the appellant and his family members and that was the reason of the present occurrence.

3. On the basis of the aforesaid Fradbeyan of P.W.6, Nawadah P.S. Case No. 155 of 1992 under Section 302 of the Indian Penal Code was registered on 06.07.1992 and on same day



at about 8.30 A.M. formal F.I.R. was drawn up, which was sent to the concerned court through Special Messenger, but the aforesaid formal F.I.R. was put up before the Chief Judicial Magistrate, Nawadah, on 07.07.1992. The Investigating Officer (P.W.10) took the charge of investigation and after completion of investigation, he submitted the charge sheet. Thereafter, the cognizance of the offence was taken and the case was committed to the court of Sessions. The appellant was put on trial and accordingly, he stood charged for the offence punishable under Section 302 of the Indian Penal Code, to which, he denied and claimed to be tried.

4. In course of trial, altogether, 11 prosecution witnesses were examined and prosecution also got exhibited the inquest report, postmortem report, formal F.I.R. as well as Fradebyan. The statement of appellant was recorded under Section 313 of the Cr.P.C., in which, he denied the prosecution story and claimed his false implication.

The defence also examined one defence witness, who proved bedhead ticket as Ext.A.

5. Learned court below after scrutinizing the evidences available on the record passed the Judgment of conviction and sentence order against the appellant, against which, this appeal has been preferred by the appellant.



6. Learned counsel for the appellant assailed the impugned Judgment of conviction and sentence order arguing that the learned court below has not properly appreciated the evidences and failed to take notice of this fact that when the deceased was taken to the Hospital, it was reported to Doctor that the deceased sustained injury due to fall. He further submitted that the learned court below also failed to take notice of this fact that there was inordinate delay in lodging as well as sending the F.I.R. to the court concerned and there was ample opportunity to manufacture and replace the First Information Report. He further submitted that the witnesses although claimed to be eye witness, but as a matter of fact, the witnesses examined on behalf of the prosecution are not eye witness and no reliance could be safely placed their testimony.

7. On the other hand, learned Additional Public Prosecutor supported the impugned Judgment of conviction and sentence order arguing that, almost, all the eye witnesses have stated in their evidence that it was the appellant, who gave fatal blow to the deceased and, therefore, the learned court below rightly convicted the appellant.

8. As we have already stated that, altogether, 11 prosecution witnesses were examined by the prosecution in course



of trial, out of them P.W.1, P.W.2, P.W.3 and P.W.8 claimed themselves to be eye witness of the alleged occurrence, but P.W.1 at paragraph 13 of his cross-examination admitted that when he reached at the place of occurrence, the deceased was in unconscious state. This witness further stated that he went running to Baleshwar Mistry and enquired from Baleshwar Mistry about the noise, upon which, Baleshwar Mistry disclosed that some thieves had encircled him, but due to darkness he could not identify thieves. This witness stated that he as well as others started chasing those thieves, who were fleeing towards Asharhi Bandh. It is apparent from the aforesaid statement of P.W.1 that he is not an eye witness of the alleged occurrence rather he stated a different story in his cross-examination and, therefore, in our view, it is unsafe to place reliance upon the statement of this witness.

9. P.W.2, namely, Kuldeep Mistry, also claimed himself to be eye witness of the alleged occurrence and this witness stated that the appellant gave lathi blow causing head injury to deceased, Balmiki Mistry. This witness also claimed that he as well as others snatched lathi from the appellant, who fled away towards northern side and thereafter the deceased was taken to Sadar Hospital, Nawadah, but the deceased died in next morning. This witness stated that the police came in next morning and recorded the



statement of P.W.6. This witness is father of deceased, Balmiki Mistry. At paragraph 9 of his cross-examination, he admitted that the deceased was taken to Hospital by Dwarika Mistry, Sadan Mahto, Anil Rajbanshi, Saudagar Mistry, Shivshankar Mistry and Kuldeep Mistry. Although, he stated that he had not gone to Hospital, but at same paragraph, he admitted that he had gone to Sadar Hospital, Nawadah, at 7 P.M., on the alleged date of occurrence. This witness further admitted that his son, namely, Saudagar Mistry (P.W.3) had gone to Nawadah Police Station to lodge the case and returned after one and half hours. This witness further admitted that Daroga of Nawadah Police Station came in Hospital at 8.30 P.M. and recorded the statement of P.W.6 and at that time the treatment of deceased, Balmiki Mistry, was going on and deceased, Balmiki Mistry died on next day in the morning at about 4 A.M. The aforesaid statement of P.W.2 goes to show that the Fradbeyan of P.W.6 was recorded by the police in Sadar Hospital, Nawadah on the alleged date of occurrence at 8.30 P.M. and at the time of recording the Fradbeyan of P.W.6 the deceased was alive and his treatment was going on, but admittedly, the aforesaid Fradbeyan has not been brought on record by the prosecution.



10. P.W.11, namely, Krishna Kumar Sahi, admitted that he got O.D. slip from Nawadah Hospital on 05.07.1992 and he reached at Sadar Hospital, Nawadah in the night of 05.07.1992, where he found the deceased, Balmiki Mistry, in unconscious state, but his family members were not present in the hospital and he came to know from the Compounder that the family members of the deceased had gone to market to purchase the medicines.

11. The statement of P.W.11 appears to be doubtful, because more than five to six persons had gone to Hospital along with the deceased and it is unbelievable that all had left him alone, particularly, in the circumstances when the deceased was in unconscious state. Here, we would like to refer Ext.A, which is bedhead ticket and which has been brought on record by the defence. The aforesaid Ext.A goes to show that on 05.07.1992 when the deceased was taken to Hospital, P.W.4 attended him and prepared bedhead ticket and in the aforesaid bedhead ticket, the cause of injury was written as fall on the ground.

12. P.W.4, namely, Dr. Ved Brat, admitted in his deposition that Ext.A had been prepared by him. The learned trial court doubted the genuineness of Ext.A only on the ground of surmises and conjectures, but in view of statement of P.W.2 regarding recording the Fradbeyan of P.W.6 in the night of



05.07.1992 and none production of aforesaid Fradbeyan before the trial court in our view the genuineness of Ext.A could not be doubted. Further, it is admitted position of the prosecution that Fradbeyan of P.W.6 was recorded, on 06.07.1992, at about 7 A.M. and formal F.I.R. was drawn up at about 8.30 A.M. and on the same day the formal F.I.R. was sent to concerned court. It has come in evidence and admitted by P.W.11 that the court was situated at the stone thrown distance from the Police Station, but it is surprising enough that the aforesaid Fradbeyan was placed before the Magistrate on 07.07.1992. Although, there is no inordinate delay in placing the aforesaid Fradbeyan before the concerned Magistrate, but in the background of above stated discussions, the aforesaid delay in placing the Fradbeyan before the concerned Magistrate is fatal to prosecution case, particularly, in the circumstances when P.W.2 stated in his deposition that the Fradbeyan of P.W.6 was recorded in the night of 05.07.1992, i.e., prior to death of deceased, Balmiki Mistry and, if all the aforesaid facts are taken together for consideration, they clearly go to show that there was ample opportunity to police to manufacture and replace the Fradbeyan and, therefore, in our view, the above stated lacuna of the prosecution case creates serious doubt about the genuineness of the prosecution case and, in our view, the



conviction and sentence of the appellant cannot sustain in the eye of law.

13. On the basis of the aforesaid discussions, this criminal appeal is allowed and the impugned Judgment of conviction and sentence order dated 07.09.1994 passed in Sessions Trial No. 32 of 1992/170 of 1992 are hereby set aside. The appellant is on bail, he is discharged from the liabilities of his bail bond.

(Hemant Kumar Srivastava, J)

(Rajendra Kumar Mishra, J)

Bhardwaj/-

AFR/NAFR	AFR
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