

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.276 of 1995

Rajiv Ranjan Jha, son of Sri Devendra Jha, resident of Village Parsauna, P.S.- Bisfi (Patauna), in the District of Madhubani.

... .. Appellant/s

Versus

The State of Bihar.

... .. Respondent/s

with
Criminal Appeal (DB) No. 304 of 1995

1. Bhagya Narain Jha,
2. Harsh Narain Jha @ Prakash Jha, Both sons of Sri Jainandan Jha, Both residents of Village Parsaini (Navtoli), P.S.- Bisfi (Patauna), District- Madhubani.

... .. Appellant/s

Versus

The State of Bihar.

... .. Respondent/s

with
Criminal Appeal (DB) No. 342 of 1995

Rudal Jha, son of Shri Mukteshwar Jha, resident of village Navtoli, P.S., Arer, District- Madhubani.

... .. Appellant/s

Versus

The State of Bihar.

... .. Respondent/s

Appearance :
(In Criminal Appeal (DB) Nos. 276 of 1995)
For the Appellant/s : Mr. Ajay Kumar Thakur, Advocate.
Mr. Shailendra Kr. Jha, Advocate.
Ms. Swati Sinha, Advocate.
For the State : Mr. Dilip Kr. Sinha, APP

(In Criminal Appeal (DB) No. 304 of 1995)
For the Appellant/s : Mr. Murari Narain Chaudhary, Advocate.
Mr. Mohit Srivastava, Advocdate.
For the State : Mr. Dilip Kr. Sinha, APP

(In Criminal Appeal (DB) No. 342 of 1995)
For the Appellant/s : Mr. Murari Narain Chaudhary, Advocate.
Mr. Mohit Srivastava, Advocate.



For the State : Mr. S.C. Mishra, 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 : 25-09-2018

1. All the above stated appeals have arisen out of common Judgment of conviction and sentence order dated 30.08.1995 passed by learned Sessions Judge, Madhubani, in Sessions Trial No. 234 of 1991 by which and whereunder, learned Sessions Judge having found the appellants guilty for the offences punishable under Section 394 read with Section 120B of the Indian Penal Code, convicted them for the aforesaid offence and furthermore, appellant in Criminal Appeal (DB) No. 342 of 1995 was found guilty and convicted for the offence punishable under Section 302 of the Indian Penal Code, whereas remaining appellants were found guilty for the offence punishable under Section 302 read with Section 109 of the Indian Penal Code and were convicted for the aforesaid offence. Furthermore, the appellant in Criminal Appeal (DB) No. 342 of 1995 was acquitted of the offence punishable under Section 411 of the Indian Penal Code. Furthermore, all the appellants have been sentenced to undergo rigorous imprisonment for life each for the offences



punishable under Sections 302 and 302/109 of the Indian Penal Code, respectively, and to undergo rigorous imprisonment for life under Section 394/120B of the Indian Penal Code. However, both the sentences were ordered to run concurrently.

2. Bisfi (Patauna) P.S. Case No. 255 of 1990 was lodged on 11.12.1990 against unknown persons on the basis of Fardbeyan of P.W. 21, namely, Anil Kuma Jha, who gave his Fardbeyan on the same date, i.e., 11.12.1990 at about 2 P.M., at Village Raghopur Barha, before the Police Officer of Benipatti Police Station to this effect that his elder brother, namely, Sachidanand Jha proceeded to Barsawni Middle School by his bicycle at 10 A.M. from his house and at that time, he was carrying Rs.84,453/-, salary distribution register, salary bills register and messenger register in a bag. However, at about 12.30 P.M. one Dhirendar Jha, a teacher of the School in which the deceased was also Headmaster, came to the house of P.W.21 and informed him that his brother was shot dead in village Baraha. Having got aforesaid information, P.W.21 along with his father, uncle and cousin reached to orchard of village Barha, where he as well as others found the dead body of his brother, Sachidanand Jha lying in the orchard. On query from the people, who had assembled there, P.W.21 and his other family members learnt that his elder



brother Sachidanand Jha, at about 10.30 A.M., reached towards south side of orchard. In the meantime two persons who were sitting from before and out of them, one was wearing white shirt and fullpant whereas another was wearing black fullpant and coat. Both the aforesaid persons stopped his brother and got him down from bicycle and started snatching his bag but his brother Sachidanand Jha made protest and proceeded towards school, but in the meantime, one culprit, who was wearing coat, opened fire on his brother Sachidanand Jha, which hit to his brother, as a result whereof, bicycle was released from the hands of his elder brother Sachidanand Jha. However, his brother in spite of that proceeded towards the Middle School, but one of them again shot fire at him, as a result of which, his brother fell down in a drain in the orchard and died then and there. Both the above stated culprits fled away towards south-west. P.W.21, further, claimed in his Fradbeyan that some days before the occurrence, Bhagya Narain Jha and Mohan Jha etc. had beaten one teacher of Parsouni Middle School and the deceased being the Headmaster of that school got lodged case against the aforesaid persons, who got bail from the High Court. P.W.21 expressed his suspicion that the aforesaid Bhagya Narain Jha and Mohan Jha etc. got eliminated his brother, as they used to



give threatening to his brother for compromise of the aforesaid case.

3. The formal F.I.R. was drawn up for the offences punishable under Sections 394 and 302 of the Indian Penal Code against unknown persons on the same day and the Police Officer of Bisfi Police Station took charge of investigation. In course of investigation, the inquest report of the dead body of deceased was prepared, empty cartridges lying at the spot were recovered and seizure list was prepared, blood stained earth was also seized and furthermore, Colored Check coat, Pay Distribution Register, Bank Draft etc. were recovered near the field of one Charitar Yadav and, accordingly, seizure list was prepared.

In course of investigation, the appellant in Criminal Appeal (DB) No. 342 of 1995 was apprehended and he was interrogated by the police. The name of remaining appellants came in the confessional statement of appellant in Criminal Appeal (DB) No. 342 of 1995. Subsequently, his statement under Section 164 of the Cr.P.C. was recorded and furthermore, on the basis of disclosure made by appellant in Criminal Appeal (DB) No. 342 of 1995, the house of P.W.18 was raided and total some of Rs.17,200/- and one revolver were recovered from the aforesaid house and, accordingly, the aforesaid recovered articles were



seized. The statement of P.W.18 was, too, recorded under Section 164 of the Cr.P.C. Moreover, after completion of investigation, police submitted charge sheet against the appellants for the offence punishable under Sections 394, 302, 392 and 412 of the Indian Penal Code. The cognizance of the offence was taken and, accordingly, the case was committed to the court of sessions.

The appellants stood charged for the offence punishable under Sections 109/302, 394 and 120B of the Indian Penal Code and appellant in Criminal Appeal (DB) No. 342 of 1995 stood, separately, charged for the offence punishable under Sections 302 and 411 of the Indian Penal Code. The appellants denied the charges and, accordingly, the prosecution led its evidences.

4. In order to prove the charges levelled against the appellants, prosecution got examined, altogether, 21 prosecution witnesses and also got exhibited certain documents. The statement of appellants were recorded under Section 313 of the Cr.P.C., in which, they denied the prosecution story and claimed their false implication.

The appellants also got examined three witnesses in support of their defence.



The learned trial court after scrutinizing and analyzing the evidences available on the recorded convicted and sentenced the appellants in the manner, as stated above.

5. Learned counsel appearing for the appellants assailed the impugned Judgment of conviction and sentence order arguing that the learned trial court could not appreciate the evidences available on the record in its right perspective, as the learned trial court relied upon such evidences which were not admissible in evidence. Continuing his submission, learned counsel for the appellants, further, submitted that the learned trial court solely relied upon the statement of appellant in Criminal Appeal (DB) No. 342 of 1995 recorded under Section 164 of the Cr.P.C., though, the aforesaid so-called statement was not recorded in accordance with law. He submitted that it is essential that before recording the statement under Section 164 of the Cr.P.C., the concerned Magistrate should ascertain, as to whether, the maker is making statement voluntarily or not, but in the present case, there is nothing on the record to show that the learned Magistrate, who recorded the statement of appellant in Criminal Appeal (DB) No. 342 of 1995, under Section 164 of the Cr.P.C., had ascertained as to whether the appellant in Criminal Appeal (DB) No. 342 of 1994 was making his statement voluntarily or not and furthermore, there



is nothing on record to show that the learned Magistrate had given any warning to the aforesaid appellant that his statement might be used against him. He further submitted that no doubt, at the bottom of the aforesaid statement an endorsement has been made by the concerned Magistrate that the appellant was warned that his statement might be used against him, but it is obvious from perusal of the aforesaid endorsement that the said endorsement was written by the concerned Bench Clerk and the concerned Magistrate has only put his signature and the aforesaid fact has been admitted by the concerned Magistrate when he was examined in the trial court and, therefore, circumstance goes to show that the learned Judicial Magistrate had not applied his judicial mind at the time of recording the confessional statement of appellant, Rudal Jha. Moreover, the said warning should have been given before recording the statement and not after recording the statement.

Learned counsel for the appellants further submitted that, admittedly, not a single prosecution witness claimed to have seen the actual killing of the deceased and the entire prosecution case was based upon the circumstantial evidence, but the learned trial court failed to take notice of this fact that the prosecution could not succeed to establish the complete chain of events to prove the guilt of the appellants. He submitted that, however, the



learned trial court relied upon the testimony of P.W.2, who claimed that he had seen the appellants sitting in orchard prior to the alleged occurrence and also seen the appellants running from the aforesaid orchard when he heard the sound of firing. He further submitted that the learned trial court failed to take notice of this fact that P.W.2 is not a trustworthy witness, because he, himself, admitted in his deposition that he made statement before the police after one month of the alleged occurrence, as after the alleged occurrence, he went to Patna and another place and when he returned from Patna, his statement was recorded under Section 161 of the Cr.P.C. He submitted that, although, P.W.2 tried to explain the circumstances, in which, his belated statement was recorded, but as a matter of fact, when the Investigating Agency got recorded the so-called confessional statement of appellant in Criminal Appeal (DB) No. 342 of 1995 and other witnesses, the prosecution got set up P.W.2. Learned counsel for the appellants submits that P.W. 4 claimed in course of trial that one day prior to the alleged occurrence, deceased had disclosed that appellant Rajiv Ranjan Jha of Criminal Appeal (DB) No. 276 of 1995 had made inquiry from him about the money and at that time, the remaining appellants were also present. He submitted that the learned trial court had taken note of the aforesaid circumstance and held that



the aforesaid statement of deceased is admissible in evidence under Section 32 of the Evidence Act, but the learned trial court committed error because the aforesaid so-called statement of deceased can never be treated as his dying declaration. In support of this contention, he referred AIR 2000 Supreme Court Cases 2602 and 2015 (8) Supreme Court Cases 494 and also AIR 1939 Privy Council 47. Learned counsel for the appellants also referred AIR 1964 Supreme Court Cases 1184 and 2011 (2) Supreme Court Cases 490 on the point of recording the statement of 164 of the Cr.P.C., and furthermore, he referred 1992 (1) Supreme Court Cases 473 and AIR 2003 Supreme Court Cases 1088 on the point that the statement of 164 of the Cr.P.C. cannot be sole basis for conviction. He also referred AIR 2016 Supreme Court Cases 4958 to show that belated statement of Section 161 of the Cr.P.C. creates doubt about the claim of the witness. Learned counsel for the appellants also highlighted the other infirmities in the prosecution case pointing out that P.W.10, namely, Indra Devi claimed to have seen the appellant Rudal Jha and at that time, appellant Rudal Jha had wore Dhoti and the aforesaid Dhoti had sustained blood spot, but according to the prosecution case itself, the culprits at the time of alleged occurrence had wore coat, pant and shirt etc.. Learned counsel for the appellants, further, submitted that several important



witnesses were not examined by the prosecution. He, further, submitted that Dhirendra Jha was not examined, particularly, in the circumstance when the aforesaid Dhirenra Jha was an important witness as it is the case of the prosecution that the informant got information about the alleged occurrence from the aforesaid Dhirendra Jha. Learned counsel of the appellants, further, submitted that the learned trial court convicted the appellants only on the basis of conjectures and surmises as well as on the basis of inadmissible evidence and, therefore, the impugned Judgment of conviction and sentence order cannot be sustained in the eye of law.

6. On the other hand, learned Additional Public Prosecutor supported the impugned Judgment of conviction and sentence order arguing that the learned trial court rightly relied upon the circumstantial evidences. Learned Additional Public Prosecutor submitted that P.W.2 claimed to have seen the appellants prior to the alleged occurrence and subsequently, when P.W.2 heard sound of firing, he noticed that the appellants were fleeing away from the place of occurrence. Learned Additional Public Prosecutor, further, submitted that subsequently, P.W.10 claimed that she had seen the appellant Rudal Jha wearing blood stained Dhoti and going to the house of his relative, from where



revolver and looted money was recovered and, therefore, the prosecution successfully proved circumstantial evidence which indicates only and only the guilt of the appellants and, therefore, there is no scope to interfere into the impugned Judgment of conviction and sentence order.

7. As we have already stated that, altogether, 21 prosecution witnesses were examined in course of trial on behalf of the prosecution, but admittedly, P.W.1 Krishna Kant Mishra, P.W.3 Deo Kumar Singh, P.W.6 Binay kant Mishra, P.W.11 Chandra Kant Jha, P.W.13 Rajesh Kumar Mahto, P.W.14 Nageshwar Pandit, P.W.15 Chandra Kant Mishra, P.W.18 Chandra Mukhi and P.W.19 Bharteya Devi have not supported the prosecution case in course of trial and they were declared hostile by the prosecution. The entire prosecution case is based upon the testimony of P.W.2, P.W.4, P.W.5, P.W.7, P.W.8, P.W.8(A), P.W.9, P.W.10, P.W.16, P.W.20 and P.W.21. However, P.W.8, Bishnu Kant Chaudhary is a formal witness who produced pistol and two empty cartridges before the trial court which were marked as material Ext.1, material Ext.2 and material Ext.2/1. Similarly, P.W.8(A) Harey Krishan Yadav is also a formal witness, who claimed before the trial court that he had taken sealed box to Forensic Science Laboratory, Patna and got receipt the aforesaid sealed box.



8. P.W.9 Ranjit Kumar Choudhary was posted as Judicial Magistrate at Madhbani Civil Court on 22.12.1990 and he claimed that he had recorded the statement of appellant Rudal Jha under Section 164 of the Cr.P.C.. This witness claimed that before recording the confessional statement of appellant Rudal Jha under Section 164 Cr.P.C., he had warned him that his statement might be used against him. He also claimed that at the time of recording confessional statement of appellant Rudal Jha no police personal was present there and the appellant Rudal Jha had voluntarily made his confessional statement before him. This witness proved the confessional statement of appellant Rudal Jha as Ext.3, but on being cross-examined by the defence, this witness admitted at paragraph 3 of his cross-examination that the certificate given beneath the confessional statement of Rudal Jha was not in his hand writing rather the aforesaid certificate was in the hand writing of his Bench Clerk Shrawan Kumar Jha. This witness, further, admitted that appellant Rudal Jha was brought before him by a constable from the court of Chief Judicial Magistrate.

9. P.W.16 Lal Jha claimed that the blood stained earth was seized in his presence and he had put his signature on the seizure list. He identified his signature, which has been marked as Ext.1/4. Similarly, P.W.17 is also a witness of seizure list and this



witness claims that some articles including one coat and some documents were recovered near a river in his presences and the aforesaid recovered articles were seized in his presence and he had put his signature on the seizure list.

10. P.W.7 Dr. S. N. Jha claims that he did postmortem examination on the dead body of the deceased on 11.12.1990. He has proved the postmortem report as Ext.2.

11. P.W. 2, P.W. 4, P.W. 5, P.W. 10 and P.W. 21 are the most important witnesses in this case.

12. P.W.2 claims that, on 10.12.1990, he was going to village Parsoni and while he was on his way, he met one Binay Kant Jha, who accompanied him. This witness further, claims that when he as well as Binay Kant Jha reached near the house of Mahendra Jha of village Parsoni at about 5 P.M., he saw Bhagya Narain Jha, Rajiv Ranjan Jha, Prakash Jha, Rudal Jha, Sharwan Kumar Jha and one lady sitting at the door of above stated Mahendra Jha and all the aforesaid persons were talking with each others, but when he as well as Binay Kant Jha reached near them, they kept mum. This witness, further, claimed that he went to the house of his sister and similarly, Binay Kant Jha also went to the house of his own sister. This witness, further, claimed that on 11.12.1990 at about 9.30 A.M., he along with aforesaid Binay



Kant Jha was returning to his village and when reached at orchard of village Barha, he saw Bhagya Narain Jha, Prakash Jha, Rajiv Ranjan Jha and Rudal Jha sitting there. He, further, claimed that Binay Kant Jha talked with Rajiv Ranjan Jha and, thereafter, they proceeded ahead and as soon as they reached near Barha Middle School, they heard sound of firing and after that some labourers raised alarm that the Master Sabh was shot dead. This witness claimed that he along with Binay Kant Jha went near the orchard and found Master Sabh lying dead. This witness, further, claimed that the Master Sabh (Sachidanand Jha) was well known to him prior to the alleged occurrence and he went to the house of deceased Master Sabh and gave information regarding the occurrence and, thereafter, he returned to his house. This witness, further, claimed that while he was going near the dead body of the deceased, he saw Bhagya Narain Jha, Rajiv Ranjan Jha, Prakash Jha and Rudal Jha fleeing from there.

The above stated statement of P.W.2 goes to show that this witness did not see who fired on the deceased and the aforesaid witness has brought two circumstance in evidence. Firstly, one day prior of the alleged occurrence, the appellants along with others were found sitting in front of the house of one Mahendra Jha and they were talking with each others and,



secondly, at the time of alleged occurrence, the appellants and some others were seen sitting in the orchard and after firing the appellants and others started fleeing from the occurrence. Now, we have to Judge the credibility of this witness on the basis of answers given by him during course of his cross examination. This witness states at paragraph 2 of his cross examination that when he reached at the house of deceased Sachidanand Jha to give information. Laxman Jha (P.W.4), the brother of the deceased, was present at the house and he gave information regarding the killing of deceased Sachidanand Jha to P.W.4, Laxman Jha and after that P.W.4 and others went to the place of occurrence. This witness, further claimed that after giving information about the alleged occurrence to P.W.4, he returned to his home. This witness, further, claimed that he had disclosed this fact before P.W.4 that he had seen the appellants and others fleeing from the place of occurrence. This witness, further, admitted that again after 3-4 days of the alleged occurrence, he met P.W.4 Laxman Jha at Benipatti Circle Office and again he narrated the entire incident to P.W.4. This witness, further, admitted that after 5-6 days of the alleged occurrence, he went to the Patna where he remained to 13-14 days and after that he returned to his home. He also admitted that in course of investigation, no police officials had gone to his



house but he had met police at Police Station. This witness, further, admitted at paragraph 3 of his cross examination that on the alleged date of occurrence when P.W.4 and others were going to the place of occurrence, he accompanied them up to Benipatti Block and the Police Station was on the way of Benepatti Block but he did not give any information in Police Station. Furthermore, at paragraph 4 of his cross examination, he admitted that the distance between house of Mahindra Jha and place of occurrence was about 3-4 kilometers. This witness, further, admitted at paragraph 5 of his cross examination that he had seen the dead body of the deceased Sachidanand Jha in the mid of orchard. The statement of this witness goes to show that on the alleged date of occurrence, he did not give any information to the police nor made any statement before the police officials. This witness admitted that after the occurrence, he straightway went to the house of deceased and gave information to P.W.4 about the alleged occurrence and, thereafter, he returned to his home. Furthermore, the statement of this witness goes to show that after 3-4 days, he went to Patna where he remained for near about 15 days and after that he returned to his house. There is nothing on the record to show as to when the statement of this witness before the Investigating Officer was recorded. The Investigating Officer has



not been examined in this case and, further, the testimony of this witness goes to show that the statement of this witness was appears to be recorded after 20 days of the alleged occurrence. Moreover, the statement of this witness can be tested from another angle also.

13. This witness claimed that after the occurrence he went to the house of deceased and gave information to P.W.4 about the alleged occurrence and after that he along with P.W.4 and his other family members proceeded toward place of occurrence and he accompanied them up to Benipatti Block and after that he separated from them and proceeded towards his house. P.W.4 has stated to this extent that he got information regarding the killing of his brother and P.W.4 at paragraph 3 of his cross-examination stated that information regarding the killing of his brother was given to him by Dhirendra Jha, Binay Kant Jha and Shashi Kant but contrary to the statement of P.W.2 and P.W. 4., the P.W.21 states in his Fardbeyan that he got information regarding the death of his brother from Dhirendra Jha. P.W.21 has, nowhere, in his Fardbeyan states that P.W.2 had given information to him regarding the killing of his father. P.W.2 has admitted in his evidence that his village is about 4 kilometers away from the place of occurrence and, therefore, it is obvious that P.W.2 happens to be



a chance witness and, therefore, in view of the aforesaid discussions, the testimony of P.W.2 does not appear to be trustworthy and no reliance can safely be placed upon the evidence of P.W.2.

14. P.W.4, P.W.5 and P.W.21 are brothers of the deceased and P.W.5 claimed that his deceased brother Sachidanand Jha had returned to his home from State Bank, Arer and had disclosed that appellant Raju Jha had asked him about the salary of his mother and, thereafter, he had replied to him that his mother would get salary on 10.12.1990. This witness, further, claimed that deceased disclosed to him that Raju Jha got identified him to Rudal Jha, Bhagya Narain Jha and Prakash Jha. This witness, further, claimed that on 10.12.1990, his deceased brother Sachidanand Jha along with P.W.21, namely, Anil Kumar Jha went to State Bank, Arer and withdrew cash from the Bank and on that day also his deceased brother disclosed that Raju Jha again got identified him to Bhagya Narain Jha, Rudal Jha and Prakash Jha.

15. Similarly, P.W.4 Laxman Jha claimed that in the morning of 11.12.1990, Raju Jha had come to his house and inquired about the salary of his mother upon which his deceased brother told him that the salary would be distributed at the School and, thereafter, his deceased brother went to School at about 10



A.M.. P.W.4, further, claimed that his deceased brother had withdrawn the cash from the Bank on 10.12.1990 and on the same day, said Raju Jha had asked for salary of his mother and the aforesaid fact was disclosed to him by his deceased brother and, furthermore, his deceased brother had disclosed to him that he had seen Bhagya Narain Jha, Rudal Jha, Prakash Narain Jha and Raju Jha towards west side of the Bank.

16. The prosecution has brought the above stated circumstances to show the involvement of the appellants in the alleged crime and the learned trial court relied upon the aforesaid testimony of P.W.4 and P.W.5 and also treated the so-called statement of deceased as his dying declaration. According to the P.W.4 and P.W.5 itself, the deceased had disclosed the above stated facts to them prior to the alleged occurrence and, therefore, even if, the claim of P.W.4 and P.W.5 assumed to be true, then also the so-called disclosure of the deceased before P.W.4 and P.W.5 cannot be treated as dying declaration, because the aforesaid disclosure was made prior to the alleged occurrence and, therefore, the aforesaid so-called statement of deceased cannot be taken in evidence under Section 32(5) of the Evidence Act and, in our view, the learned trial court wrongly treated the so-called statement of the deceased as the dying declaration.



17. P.W.4 admitted in his cross-examination that Dhirendra Jha had given information to him about the alleged occurrence but, admittedly, the aforesaid Dhirendra Jha has not been examined. Furthermore, P.W.4 stated at paragraph 4 of his cross-examination that his deceased brother had gone to Arrer State Bank on 09.12.1990 and 10.12.1990, whereas P.W.21 stated at paragraph 3 of his examination-in-chief that he along with his deceased brother had gone to State Bank Arer, on 05.12.1990 and 10.12.1990. P.W.4, further, admitted at paragraph 4 of his cross-examination that he had not talked with his deceased brother on 09.12.1990 and similarly, his other brothers had also not talked with deceased on 09.12.1990. This witness, further, admitted that on 11.12.1990 also he had not talked with the deceased.

18. P.W.5 claimed that only Dhirendra Jha had given information about the death of his brother and, after that he along with his family members went to the place of occurrence. P.W.5 has, nowhere, stated that P.W.2 and Binay Kant Jha had also given information about the alleged occurrence. P.W.5 claimed that before police, he had stated that P.W.21 had gone to Arrer State Bank along with deceased on 10.12.1990 and on the same day Raju Jha and others had also gone to Arer State Bank and they got identified the deceased. P.W.21 claimed that on 05.12.1990 when



he along with deceased had gone to State Bank, Arer to deposit Draft, they met Rajiv and similarly, on 10.12.1990 when he along with deceased had gone to State Bank, Arer, they met Rajiv, Bhagya Narain and two others and on that very day, Rajiv inquired from deceased about the salary of his mother but this witness admitted at paragraph 14 of his cross-examination that he learnt at the place of occurrence that two persons had committed the occurrence but the persons, who disclosed the above stated fact, had not disclosed the name of those persons who committed the alleged crime and this witness admitted that till the date of recording of his statement, he was not aware about the name of above stated two persons who committed the alleged crime. However, at paragraph 15 of his cross-examination, this witness admitted that he did not know in which bank the account of his brother's School stood. The aforesaid admission of P.W.21 belies his claim that he had gone along with deceased to withdraw the salary amount from State Bank Arer and creates doubt about the claim of this witness.

19. P.W.10 Indra Devi @ Indra Jha claimed that on 11.12.1990 at about 11 A.M., while she was going to attend her school, on way, she saw the appellant Rudal Jha who was going hurriedly and entered into the house of his Fufi. This witness



claimed that she had noticed blood stain on Dhoti of Rudal Jha and when she reached at her School, she came to know that Rudal Jha killed the deceased and snatched his belongings. This witness, further, claimed that the police had recovered Rivolver and cash from the house of Fufi of appellant Rudal Jha. This witness, further, claimed that she had given information to the above stated fact to police at police camp, Parsoni but she had not signed her statement. This witness admitted that her statement under Section 164 of the Cr.P.C. was recorded but she had not disclosed before the Judicial Magistrate that cash and Rivolver were recovered from the house of Fufi of appellant Rudal Jha.

The above stated admission of P.W.10 creates doubt about her claim. Moreover, in her cross-examination she admitted that there was enmity between her and appellant, Rudal Jha. Moreover, P.W.21 had claimed that at the time of alleged occurrence, the criminals were wearing shirt, fullpant and coat and, therefore, even, if, it assumed that this witness had seen blood stain on the Dhoti of appellant, Rudal Jha, then also only on that basis, it cannot be said that the appellant, Rudal Jha, had participated in the alleged crime. Moreover, the said Dhoti has not been seized neither sent for forensic examination.



20. Learned trial court has taken into consideration the confessional statement of appellant, Rudal Jha, recorded under Section 164 of the Cr.P.C. for convicting him but it is obvious from perusal of deposition of P.W.9 as well as Ext.3 that the aforesaid confessional statement of appellant, Rudal Jha, has not been recorded in accordance with law, because there is nothing to show that before recording the statement of appellant, Rudal Jha, any warning regarding the use of aforesaid confessional statement in evidence was given to him. No doubt, in the bottom of the aforesaid statement, a certificate to this effect has been given but mere giving of the aforesaid certificate is not sufficient to show that the appellant, Rudal Jha was warned before recording his confessional statement under Section 164 of the Cr.P.C. It is pertinent to note that recording of confessional statement under Section 164 of the Cr.P.C. is not a mere formality. Before recording the confessional statement of a person under Section 164 of the Cr.P.C, it is incumbent duty of the Magistrate to warn the concerned person that his statement could be used against him in evidence and the concerned Magistrate should ensure him before recording the confessional statement of a person that the aforesaid confessional statement is being made by concerned person by his free will and voluntarily and at the time of recording the



confessional statement, the concerned person is not under influence of police or any other person. In the present case, the learned Magistrate (P.W.9) has admitted in his deposition that the appellant, Rudal Jha, was produced before him by a constable from the court of Chief Judicial Magistrate and the aforesaid fact goes to show that at the time of recording the confessional statement of appellant, Rudal Jha, the said appellant was in the custody of police. There is nothing on the record to show that the learned Magistrate had taken any steps to release the influence of police from the mind of appellant, Rudal Jha, before recording his confessional statement and, therefore, we do agree with the submission of the learned counsel for the appellants that the confessional statement of appellant, Rudal Jha, was not recorded in accordance with law. Moreover, the Judgment of conviction and sentence order cannot be based solely on the basis of confessional statement of accused unless it is corroborated by other materials.

21. In the present case, admittedly, none had seen the actual killing of the deceased and the prosecution case hinges upon the testimonies of P.W.2, P.W.4, P.W.5, P.W.10 and P.W.21 but as we have already discussed the evidences of the aforesaid prosecution witnesses and came to the conclusion that no reliance can safely be placed upon the testimony of above stated



persecution witnesses. Therefore, in our view, the prosecution miserably failed to prove its case beyond all shadow of reasonable doubts and the learned trial court committed error in convicting and sentencing the appellants in passing the impugned Judgment of conviction and sentence order.

22. On the basis of aforesaid discussions, the aforesaid criminal appeals are allowed and the impugned Judgment of conviction and sentence order dated 30.08.1995 passed in Sessions Trial No. 234 of 1991 are, hereby, set aside. The appellants are acquitted of the charges. The appellants are on bail, they are discharged from the liabilities of their respective bail bonds.

(Hemant Kumar Srivastava, J)

(Rajendra Kumar Mishra, J)

Bhardwaj-Rahul/-

AFR/NAFR	AFR
CAV DATE	NA
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