

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.1208 of 2011

Arising Out of PS. Case No.-73 Year-2009 Thana- GOPALPUR District- Bhagalpur

Shibal Sah, son of Nage Sah, resident of village - Sindhiya Makanpur, P.S. -
Gopalpur, District - Bhagalpur.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

Criminal Appeal (DB) No. 1030 of 2011

1. Nage Sah, son of Late Kulo Sah
2. Rajesh Kumar Sah @ Rajesh Sah, son of Nege Sah
Both are resident of Village-Sindhiya Makanpur, P.S.- Gopalpur,
District - Bhagalpur

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

(In Criminal Appeal (DB) No. 1208 of 2011)

For the Appellant/s : Sri Ajay Thakur, Advocate
Sri Radha Mohan Singh, Advocate
Sri Dilip Kumar , Advocate

For the Respondent/s : Sri Ajay Mishra, A.P.P.

(In Criminal Appeal (DB) No. 1030 of 2011)

For the Appellant/s : Sri Ajay Thakur, Advocate
Sri Radha Mohan Singh, Advocate
Sri Dilip Kumar, Advocate

For the Respondent/s : Sri Ajay Mishra, A.P.P.

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 01-10-2018

1. Appellant No. 1 (Nage Sah) is the father of appellant
no. 2/ Rajesh Kumar Sah @ Rajesh Sah in Cr. Appeal (D.B.) No.
1030 of 2011 and also father of sole appellant/ Shibal Sah [in Cr.



Appeal (D.B.) No. 1208 of 2011]. Since appellants of both the Appeals were tried together and convicted and sentenced by the same judgment, both the Appeals were taken up together and are being disposed of by this common judgment.

2. All the three appellants by judgment dated: 21-09-2011 were convicted for the offence under Sections 302/34 of the Indian Penal Code, 1860 (hereinafter referred to as the 'I.P.C.') , however, Shibal Sah/ appellant [in Cr. Appeal (D.B.) No. 1208 of 2011] was further convicted for offence under Section 27 of the Arms Act, 1959 (hereinafter referred to as the 'Arms Act'). By order dated: 24-09-2011 all the three appellants under Section 302 / 34 of the I.P.C. were sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/- each. In default of payment of fine, they were directed to further undergo imprisonment for three months. Shibal Sah [appellant in Cr. Appeal (D.B.) No. 1208 of 2011] under Section 27 of the Arms Act by order dated- 24-09-2011 was sentenced to undergo rigorous imprisonment for three years. All the appellants were tried together in Sessions Trial No. 200 of 2010 by Sri Bashisth Shukla, learned 2nd Additional District and Sessions Judge, Naugachia, Bhagalpur (hereinafter referred to as the "trial judge").



3. Short fact of the case is that on 19-02-2009 at 11:30 A.M. Sub Inspector of Police- cum -S.H.O., Gopalpur Police Station, namely: Sri Umesh Lal Rajak (P.W. 10) recorded fardbeyan of Santosh Kumar Sah (P.W. 6). The fardbeyan was recorded at the place of occurrence itself in village - Sindhiya Makandpur under Gopalpur Police Station, District- Bhagalpur. In the fardbeyan the informant stated that on 19-02-2009 at about 10:30 A.M. his brother / Sanjay Sah (deceased) was lonely coming from Makandpur Chowk to his house and while he reached near the house of Gireshwar Sah (not examined), he was met with Nage Sah [appellant no. 1 in Cr. Appeal (D.B.) No. 1030 of 2011], Shibal Sah [sole appellant in Cr. Appeal (D.B.) No. 1208 of 2011] and Rajesh Kumar [appellant no. 2 in Cr. Appeal (D.B.) No. 1030 of 2011]. Thereafter from backside Shibal Sah putting his country made pistol on his head gave shot of firing. His brother fell down and blood started oozing out. As soon he along with his villagers arrived at the place of occurrence his brother had already died at the place of occurrence itself. The main reason for the occurrence was explained by the informant that dispute since last two years was going on regarding partition of land of Ismailpur Diara in between his father- Jagarnath Sah (P.W. 9) and appellant /Nage Sah. In respect of the same dispute in the past *Panchayati* was also



held. It was claimed that this was the reason that his brother – Sanjay Sah was killed. The informant claimed that his brother was killed by giving shot of firing from country made pistol by Nage Sah, Shibal Sah and Rajesh Sah. The said fardbeyan was read over to him and after finding it correct he put his signature. The fardbeyan was also got signed by two witnesses as F.I.R. witnesses, namely: Mukesh Kumar and Ravi Bhushan Sah. However, both were not examined by the prosecution during the trial. On the basis of the said fardbeyan on 19-02-2009 at 14:30 Hrs. (2.30 P.M.) a formal F.I.R. vide Gopalpur P.S. Case No. 73 of 2009 was registered under Section 302/34 of the I.P.C. and Section 27 of the Arms Act against all the three appellants. After recording fardbeyan Police investigated the case and finally finding the accusation against appellants true on 31-05-2009 charge-sheet was submitted against all the three appellants. On 11-06-2009 learned Addl. Chief Judicial Magistrate, Naugachia, Bhagalpur took cognizance of offences. After completion of formalities under Section 207 of the Code of Criminal Procedure, 1973 [hereinafter referred to as the “Cr.P.C.”] on 10-02-2010 the case was committed to the court of Sessions and it as numbered as Sessions Trial No. 200 of 2010.



4. During the trial to prove its case on behalf of the prosecution altogether 12 witnesses were examined. Out of them, P.W. 1 (Sudama Devi), P.W. 2 (Prakash Sah) / brother-in-law (‘ बहनोई ’ of the deceased), P.W. 3 (Preety Devi) and P.W. 6 (Santosh Kumar Sah) / informant were examined as eye-witnesses to the occurrence. P.W. 7 (Sudhir Sah) had put his signature on the inquest report, which was marked as Ext. 2. P.W. 5 (Subash Sah) was only tendered for cross-examination. P.W. 8 (Dayanand Sah), who was the only independent witness has turned hostile. P.W. 9 – Jagarnath Sah (father of the deceased) has come forward to depose as if after the occurrence he had seen the accused persons fleeing away. P.W. 11- Srikant Mandal is the 2nd Investigating Officer, who had only submitted charge-sheet. P.W. 12 (Dr. Rabindra Kumar Verma) on 19-02-2009 was posted as Medical Officer, Sadar Hospital, Naugachia and he conducted post-mortem examination on the dead body of the deceased and he proved the post-mortem examination report, which was marked as Ext. 3. P.W. 10 (Umesh Lal Rajak) on 19-02-2009 was posted as Officer -in-charge, Gopalpur Police Station. During investigation he recorded fardbeyan, which was marked as Ext.1/A and prepared inquest report, which was marked as Ext. 2/A. After completion of the prosecution evidence, on 22-07-2011 evidences and



circumstances brought on record during the trial were explained to the accused persons and their statement under Section 313 of the Cr.P.C. was recorded in which they claimed to be innocent, however, from defence side, no witness was examined.

5. Sri Ajay Thakur, learned counsel, assisted by Sri Radha Mohan Singh, learned counsel for the appellants after referring to entire evidences has argued that prosecution has miserably failed to establish its case beyond all reasonable doubts. He submits that in a case in which there was no admissible evidence, the learned trial judge has incorrectly passed the judgment of conviction and sentence. At the very outset he has argued that as per F.I.R. of the informant / P.W.6 initially the informant had come out with a case that the occurrence was seen only by him, however, subsequently, with discussion, prosecution has come out with a case as if the occurrence was seen by number of witnesses. It has been argued that considering the fardbeyan the evidences of other eye-witnesses can be considered as doubtful and not credible. He submits that none of the witnesses who were examined as eye-witnesses had seen the occurrence. Sri Thakur, learned counsel for the appellants has further placed heavy reliance on the evidence of P.W.9, who is none else but the father of the deceased, namely; Jagarnath Sah. By way of referring to



paragraph-5 of his cross-examination he has argued that P.W.9 in his evidence has stated that after the occurrence his wife namely: Sudama Devi was the first witness who reached the place of occurrence and thereafter in sequence P.W.6 – Santosh (informant) and P.W.3 – Preety Devi (wife of deceased) arrived. Taking advantage from the evidence of P.W.9 it has been reiterated that even the first version of the prosecution case appears to be doubtful. The reason behind it was that the P.W.9 himself has stated that at the place of occurrence firstly P.W.1 arrived and only thereafter the informant had come to the place of occurrence. Meaning thereby that the evidence of P.W.6 /informant is not credible and it cannot be relied upon.

6. Sri Ajay Thakur, learned counsel for the appellants by way of referring to oral evidences vis-a-vis medical evidence has argued that the prosecution case appears to be not believable. He submits that the informant in his fardbeyan has stated that appellant/ Shibal Sah putting country-made pistol on the head of the deceased had fired and thereafter number of witnesses have come forward to depose that firing was made from close range, however; during post-mortem examination firing from close range has been belied. The doctor who conducted post-mortem examination during post-mortem had not found any charring or



burn injury on the entry side whereas the witnesses had come out with a case that they had seen the head of the deceased and his hair was already burnt. Sri Thakur, learned counsel for the appellants, even though no such suggestion was given to either of the witnesses, has argued that it appears that the deceased was done to death somewhere else and his dead body was thrown on the road and subsequently due to old animosity all male members of the appellants who were non-else but close relation of the informant were fixed as accused with a view to grab landed property of the appellants. To substantiate his submission he has emphasized that during investigation the Investigating Officer had not at all prepared any seizure list regarding blood soaked soil whereas as per the prosecution case immediately after the occurrence Police had arrived at the place of occurrence. The Investigating Officer has also not found empty cartridge at the place of occurrence. This fact has come during the evidence of the Investigating Officer.

7. Sri Thakur has also argued that prosecution has suppressed the earlier version and this is the reason that the Investigating Officer in his evidence has deposed and described the case from the stage of recording fardbeyan. He has not at all disclosed as to how he arrived at the place of occurrence, who intimated him and what was the source of information. In the



examination-in-chief nothing was stated by him but in cross-examination on being asked he stated that he was telephonically informed but he did not say that what exact information he received. Sri Thakur has argued that this suggests that Police had earlier received specific information regarding the occurrence but to the reasons best known to the prosecution initial version was suppressed and subsequently the informant with discussion with other witnesses has lodged the present case. Sri Thakur submits that P.W. 9 during cross -examination has stated that fardbyan was recorded after discussing the matter for about five minutes.

8. Sri Thakur has further argued that entire prosecution case appears to be not believable due to the reason that from stage to stage the prosecution has developed its case. He submits that though initially none of the witnesses had stated as to whether deceased before his death had named appellant/ Shibal Sah, during trial the mother of the deceased (P.W. 1) deposed as if while she reached the place of occurrence his son named Shibal Sah and thereafter immediately he died. Same thing was stated by P.W. 9. Learned counsel for the appellants at this juncture has drawn our attention to the post- mortem examination report as well as the evidence of the doctor and has argued that in the case on occipital region firing was made from country made pistol. The cartridge



after breaking the bone had already entered inside the brain and in such situation there was no reason for the deceased to make any statement. Such injury was enough for causing instantaneous death which was stated by the doctor / P.W. 12 and to some extent the informant / P.W. 6 in his fardbyan has also stated. Learned counsel for the appellants has also tried to persuade the court that the evidence of informant as well as wife of deceased (P.W. 3) may not be believed since from the house of the informant it was impossible to see the place of occurrence. By way of referring to the evidence of the Investigating Officer in which he has described regarding the place of occurrence, he has argued that the place of occurrence was a road facing South to North. From the said road there was brick soling road which was connected to lanes i.e. teenmohaani ('More' leading to three ways) and one of the lanes was leading to the village / house of the informant. He has argued that the lane of the informant was having number of buildings and as such it was not possible for the informant to see the occurrence while standing at his door or by any other witnesses who had claimed to witness the occurrence from the house of the informant. Sri Thakur has further argued that so far appellants in Cr. Appeal (D.B.) No. 1030 of 2011 are concerned the entire prosecution has been vitiated due to the simple reason that it was a



case of glaring violation of the statutory provision contained under Section 313 of the Cr.P.C. He has argued that evidences which were not brought on record were explained to them and as such he submits that the case is in the teeth of the judgment of the Hon'ble Apex Court reported in AIR 1984 SUPREME COURT 1622 (Sharad Birdhichand Sarda v. State of Maharashtra). On aforesaid grounds it has been argued that it was a case of false implication. Alternatively, it has been argued that, in any event, the prosecution has not been able to establish its case beyond all reasonable doubts. Accordingly, as per learned counsel for the appellants the judgment of conviction and sentence is liable to be set aside.

9. Sri Ajay Mishra, learned Addl. Public Prosecutor opposing the Appeal has heavily relied on the evidence of P.W.1 and P.W.6. He submits that P.W.1 is the mother of the deceased and in her evidence she has categorically stated that at the time of occurrence she had gone out of the house to a shop and while returning she had seen the occurrence. Similarly, informant/ P.W.6 in categorical term has stated that while he was cleaning near the door he saw that his deceased brother was coming who was intercepted by the three appellants and thereafter he was fired upon by the appellant/ Shibal Sah. He submits that it is consistent case



of all the eye-witnesses that in the occurrence only one shot of firing has been made and this has been corroborated by the medical evidence i.e. post-mortem examination report (Ext.3).

10. Besides hearing learned counsel for the parties, we have minutely examined entire evidences available on record. Before proceeding further, it would be necessary to firstly examine the evidence of the informant, who has been examined as P.W. 6 namely: Santosh Kumar Sah. The informant is the own brother of the deceased. In his evidence he stated that on the date and time of occurrence he was cleaning outside the door. His mother was going to shop. His brother/ Sanjay Sah (deceased) was coming near the house of one Gireshwar, in the meanwhile, he saw that Nage Sah and Rajesh Sah both had caught arms of Sanjay (deceased) and from backside, Shibal Sah fired on his head. His brother fell down and all the three accused fled away. When he reached near his brother his brother had already died. His mother had already arrived there. Before proceeding it would be necessary to again examine the fardbeyan, which is Ext. 1/A. In the fardbeyan he had simply stated that while his brother (deceased) was coming from the market and reached near the house of Gireshwar Sah he met all the three appellants and from backside Shibal Sah putting country-made pistol on his head fired. In the



fardbeyan he stated as if all the appellants were not present there with a view to kill his brother, but in his evidence he has developed a story as if two appellants in Cr. Appeal (D.B.) No. 1030 of 2011 caught arms of the brother of the informant and thereafter from backside appellant/ Shibal Sah fired. This contradiction and development certainly creates doubt regarding the credibility of this witness. Besides other evidences which we will be discussing further, in paragraph-13 of his cross-examination he has stated that appellants were his own खास गोतिया and stated that there was no good relation. However, in paragraph-15 of his cross-examination he further stated that his brother had already partitioned with Nage Sah/ appellant. In the fardbeyan a specific stand was taken that since last two years dispute was going on in between the parties regarding partition of landed properties however during evidence the informant has changed the very motive of the occurrence and he has not reiterated regarding the land dispute in between the parties. In paragraph-15 itself of his cross-examination he has further made it clear regarding absence of P.W.2 / Prakash Sah at the place of occurrence whereas P.W.2 /Prakash Sah during trial has come out with a case as if he along with deceased was coming and he had seen the occurrence. Evidence of P.W. 2 also appears to be not believable due to the



simple reason that the informant in his fardbeyan had disclosed that at the time of occurrence his brother alone was coming from the market. Besides this, facts disclosed in paragraph-15 of the cross-examination of P.W. 6 makes it clear regarding non-presence of P.W.2, and as such, there is no reason to place any reliance on the evidence of P.W. 2.

11. In this case, there are three other important witnesses, who had claimed to have seen the occurrence. Those are: P.W.1 / Sudama Devi (mother of the deceased), P.W.3 / Preety Devi (wife of the deceased) and P.W. 9 / Jagarnath Sah (father of deceased).

12. P.W.1/ Sudama Devi in her evidence has stated as if while she was returning from the shop she saw the occurrence and she was the first person who arrived at the place of occurrence. However, P.W.9 /Jagarnath Sah, who is none else but husband of P.W.1 in paragraph-4 of his cross- examination has stated that at the time of occurrence his wife /P.W.1, his daughter-in-law / P.W.3 (Preety Devi) and P.W.6 /Santosh Kumar Sah (informant) were at their residence. If we consider some substance in the evidence of P.W. 9 certainly evidence of P.W. 1 may not be relied upon. Moreover, in the fardbeyan i.e. Ext.1/A nothing was indicated regarding presence of P.W. 1 at the place of occurrence. Similarly,



Preety Devi (P.W. 3) has also claimed to be eye-witness to the occurrence however her evidence may not be treated as credible in view of the evidence of P.W. 9 (her father-in-law) who stated that at the time of occurrence this witness was also at the residence. P.W. 9 in his evidence has stated that after the occurrence he went to place of occurrence and he has claimed that he had identified the accused persons while fleeing away. Meaning thereby that in view of evidence of P.W. 9 evidence of P.W. 3 (Preety Devi) may not be believed.

13. Now, the evidence of P.W. 9 is required to be examined as to whether his evidence is truthful or not. P.W. 9 in his evidence has stated that after hearing the sound of firing lonely he went to the place of occurrence which was the road opposite the house of Gireshwar Sah and Kailash Jha and he claimed that he saw all the three appellants fleeing away towards Eastern side. He further stated that the bullet had hit on the backside of the head of his son. He further stated that while his mother arrived there the deceased had taken the name of Shibal. If we examine the evidence of P.W. 6 (informant) vis-a-vis the evidence of this witness the presence of this witness at the place of occurrence immediately after the occurrence appears to be doubtful. Moreover, the stand taken by this witness that deceased had named



one of the appellants- Shibal creates serious doubt on his veracity due to the simple reason that injuries which were found on the person of the deceased i.e. occipital region of the scalp of the deceased given by gun shot as well as the evidence of P.W. 12 it is not believable that deceased after receiving such injuries was in a position to make any statement. After such injury, as per the doctor, death was instantaneous. In his cross-examination in paragraph – 3 he stated that in between the place of occurrence and his house there were 2-3 houses. Again in paragraph – 4 of his cross -examination he has stated that at the time of occurrence his daughter -in-law, son / Santosh (informant) and wife were inside the house. He reiterated that after the occurrence firstly his wife reached the place of occurrence, then he, thereafter Santosh and subsequently, his daughter -in law arrived there. His wife who was examined as P.W. 1 instead of claiming to have seen the accused persons fleeing away has stated as if in her presence occurrence had taken place. Accordingly there is no reason to place any reliance on the evidence of P.W. 9. Informant / P.W. 6 has also proved his signature on the fardbyan, which was marked as Ext. 1.

14. P.W. 12 / Dr. Rabindra Kumar Verma on 19.02.2009 was posted as Medical Officer, Sadar Hospital, Naugachia and he



held post- mortem examination on the dead body of the deceased on the same day and in his examination he found following ante-mortem injuries on the person of the deceased:-

“External examination - Lacerated wound 3/4" x 1/2" x bone deep on lower part of mid occipital region of the scalp with inverted margin.

On dissection- Fracture with loss of lower occipital bone 3/4 " x 1/2 ". A metallic substance found inside the brain matter of right hemisphere. Clotted blood was found in the cranial cavity.

Cause of death - In my opinion death was due to hemorrhage and shock due to above noted injuries caused by fire arm.”

He further stated that the post- mortem report was in his writing and signature, which was marked as Ext. 3. In cross-examination he stated that **post -mortem report does not mention any charring or burn on any part of the body**. The post -mortem report further demolishes the case of prosecution that firing was made from very close range. The informant in his affidavit has stated that by putting country made pistol on head firing was made. In such situation non- finding of charring or burn injury creates serious doubt on the evidence of the so-called eye witnesses.

15. The Investigating Officer /Srikant Mandal, who was examined as P.W. 11 had only submitted supplementary charge-sheet. Virtually, he had not done any relevant investigation. In the



case main Investigating Officer is P.W. 10/ Umesh Lal Rajak, who at the relevant time was posted as Officer -in-charge of Gopalpur Police Station. He proved the inquest report, which was marked as Ext. 2/A and also fardbyan (Ext. 1/A). In his evidence he has made it clear that no seizure list was prepared either regarding seizure of blood stained soil or empty cartridges at the place of occurrence. No sort of evidence regarding establishing of the place of occurrence has come in his evidence save and except the fact that in his evidence he has stated that he had noticed blood at the place of occurrence. The inquest report was also prepared at the place of occurrence and this is the reason that in the inquest report case no. was not mentioned.

16. We have also examined the statement of the appellants recorded under Section 313 of the Cr.P.C. Of -course, so far appellant/ Shibal Sah is concerned he was explained that evidence has come that by the weapon which he was carrying had shot firing on the deceased at the place of occurrence and in similar manner same question was put to rest two appellants and as such it appears that in the case there is non-compliance of the statutory provision contained under Section 313 of the Cr.P.C.

17. In view of examining aforesaid evidences, we are of the considered opinion that prosecution has not been able to



establish its case beyond all reasonable doubt. On examination of the evidences and suggestions which were given to most of the witnesses it appears that defence right from the very beginning had taken stand that the deceased was member of a gang who were involved in unauthorizedly harvesting the fields of Diara area and suggestion was given that the deceased was done to death by another gang. Since there is complete inconsistency in the evidences which have been brought on record, which we have discussed here-in-above elaborately, it is evident that the witnesses are not credible, and as such, relying on such evidences, it would not be safe to approve conviction and sentence of the appellants.

18. In view of the facts and circumstances and evidences which we have discussed here-in-above, we are of the considered opinion that prosecution has not been able to establish its case beyond all reasonable doubts, and as such, by way of extending benefit of doubt, it is necessary to interfere with the judgment of conviction and sentence. Accordingly the judgment of conviction dated: 21-09-2011 and sentence dated- 24-09-2011 passed by Sri Bashisth Shukla, learned 2nd Additional District and Sessions Judge, Naugachia, Bhagalpur in Sessions Trial No. 200 of 2010 [arising out of Gopalpur P.S. Case No. 73 of 2009 (G.R. No. 247 of 2009)] is hereby set aside and both the Appeals are allowed.



19. The sole appellant / Shibal Sah in Cr. Appeal (D.B.) No. 1208 of 2011 is inside jail and since judgment of conviction has been set aside, he is directed to be released forthwith, if not wanted in any other case.

20. So far two appellants, namely : (1) Nage Sah ; and (2) Rajesh Kumar Sah @ Rajesh Sah in Cr. Appeal (D.B.) No. 1030 of 2011 who are on bail, are hereby discharged of liability of their bail-bonds.

(Rakesh Kumar, J)

(Arvind Srivastava, J)

praful/-

AFR/NAFR	AFR
CAV DATE	N/A
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