

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.24 of 2003

Arising Out of PS.Case No. -null Year- null Thana -null District- NALANDA (BIHARSHARIFF)

- =====
1. Sidho Paswan S/O Late Kali Paswan
 2. Mahesh Paswan S/O Late Kali Paswan
 3. Rajendra Paswan S/O Late Kali Paswan
 4. Sanjay Paswan S/O Chandra Paswan

All residents of village- Moti Bigha, P.S. Sarmera, District Nalanda.

.... Appellants

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellants : Mr. Ranbir Singh, Amicus Curiae
For the Respondent : Mr. Bipin Kumar, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 13-03-2018

Heard the parties.

2. No one appears in spite of repeated calls on behalf of the appellants, as such Sri Ranbir Singh, Advocate, is appointed as the Amicus Curiae to assist the Court.

3. All the appellants stand convicted under Section 304 (Part II) read with Section 149 of the Indian Penal Code and appellant Sidho Paswan, Mahesh Paswan, Rajendra Paswan and Sanjay Paswan have been sentenced to undergo R.I. for five years whereas appellants Bindeshwar Paswan and Chandar Paswan have been sentenced to undergo R.I. for three years, vide judgment and order dated 26.11.2002 passed by Sri Awadhesh Kumar Prasad Singh, Presiding Officer, Addl. Court No.1, Nalanda.



4. The prosecution case as per Fardbeyan of Bishesar Paswan (deceased) which was recorded by Sri Babu Lal Prasad, S.I. of Sarmera Police Station on 18.10.1987 at 2.30 P.M. at Sarmera Hospital in short is that there was some altercation between him and Kali Paswan and Kali Paswan armed with Saif, Rajendra Paswan armed with Garasa, Mahesh Paswan armed with *Saif* came and Kali Paswan assaulted with *Saif* on his head causing injury on the forehead and above left hand, Rajendra Paswan assaulted with *Garasa* in the middle finger of left hand, Mahesh Paswan assaulted with *Saif* on leg and all the other accused persons assaulted him by *lathi* due to which he fell on the ground and on hulla, co-villagers, Pyare Paswan and Dwarika Paswan came running and the accused persons fled away, thereafter he was taken to Sarmera Government Hospital for treatment. The aforesaid statement was introduced by witness Pyare Paswan and Gopal Paswan.

5. On the basis of the aforesaid Fardbeyan, Sarmera P.S.Case No.57 of 1987 was registered against the appellants and appellant Kali Paswan. After investigation, charge sheet has been submitted against all the accused persons and the case was committed to the court of Sessions, however, during the pendency of the trial, Kali Paswan died, as such Appeal against him was abated.

6. During trial the charges under Sections 302/149 of the IPC were framed against all the appellants/accused persons including



Kali Paswan as stated above. Kali Paswan died during the pendency of the trial.

7. In support of their contention, in order to prove its case, the appellants have examined six witnesses, who are P.W.1 Raj Kumari, daughter-in-law and claims to be eye witness, P.W.2 Pyare Paswan, son of the deceased and claims to be eye witness, P.W. 3 Ram Chandra Paswan, P.W. 4 Rameshwar Chauhan declared hostile, P.W.5 Gopal Paswan, who is co-villager, P.W.6, Shanti Devi tendered for cross examination.. Two witnesses have also been examined as court witness, they are C.W.1 Babulal Prasad and C.W. 2 Indradeo Prasad Singh, who have proved the postmortem report, however, their evidence shows that the Doctor who has conducted postmortem is still alive and was posted at Nawada. Defence of the accused persons is that the present case is of innocence and false implication.

8. In this case, the informant has not been examined as he succumbed to the injuries after recording of the fardbeyan and as such the learned trial court has found his statement admissible evidence under Section 32 (1) of the Indian Evidence Act.

9. The learned trial court on conclusion of the trial has convicted the appellants under Sections 304 read with Section 149 of the IPC and sentenced them as stated above.

10. Being aggrieved by the impugned judgment, the present Appeal has been preferred by the appellant.



11. Contention of the learned Amicus Curiae is that the learned trial court has found the fardbeyan admissible under Section 32 (1) of the Indian Evidence Act, however, it failed to consider that there is no certification or endorsement on the statement by the Doctor that the deceased was not in the fit state of mind to make statement rather the evidence of P.W.1 who is daughter -in -law of the deceased in para 8 discloses that he was in unconscious condition after receiving injuries and as such there is nothing available on the record to show that the deceased was in fit condition at the time of his statement recorded by the Investigating Officer, as such the learned trial court ought not to have found the same admissible. Further contention of the learned Amicus Curiae is that no independent witness has been examined and though several witnesses had been named in the FIR itself as eye witnesses of that occurrence. Further submission is that the occurrence is said to have occurred at the Darwaza of Rameshwar Chauhan but Rameshwar Chauhan has been declared hostile as he has not supported the prosecution case and another witness Ramchandra Paswan has also been tendered for examination and all the other witnesses are interested witness as P.Ws. 1 and 2 are son and daughter-in-law of the deceased.

12. Further submission of the learned Amicus Curiae is that in this case the Doctor has not been examined and the postmortem report has been proved by Pharmacist and there is



nothing in his evidence as to whether he had occasion to work with the Doctor and he is not medical expert and in such view of the matter, the postmortem report is not admissible in the eye of law. Further contention of the learned counsel for the appellants is that P.Ws. 1, 2 and 5 does not appear to be eye witness of the occurrence as they have stated that when they reached at the place of occurrence, they found the informant in injured condition, however, the learned trial court in spite of the infirmities in the case has convicted the appellants under Section 304 (II) read with Section 149 of the IPC.

13. Contra the learned counsel for the State has defended the impugned judgment holding the appellants guilty under Section 304 (II) of the IPC and submitted that the evidence of P.Ws. 1, 2 and 5 are consistent as far manner of occurrence is concerned and the informant has died after recording of the fardbeyan and as such his evidence is also admissible in the eye of law and that the same has been corroborated by the evidence of P.Ws. 1, 2, and 5. In such a situation, there is ample evidence that the appellants have assaulted the deceased causing injury to him and he succumbed to the injuries later on while taken to the Government Hospital, Biharsharif, as such conviction of the appellants under Sections 304 (Part II)/149 of the IPC does not suffer from any infirmities and appears to be just and proper and does not require any interference by this Court.

14. Having heard both sides. In the background of their



submissions while examining the evidence available on the record, it appears that the informant has not been examined. As the witnesses have stated that he later on died due to injuries. It appears from perusal of the evidence that statement has been attested by witness Pyare Paswan, who is son of the informant and Gopal Paswan. No doubt there is nothing in the fardbeyan to show that the deceased was in fit state of mind at that time of recording Fardbeyan, however, none of the witness i.e. P.W.2 and 5 have been cross examined on those points and the S.I. who has recorded statment i.e. P.W.1 has stated that he has recorded fardbeyan and he read and explained over to him and put his signature and at that time, Pyare Lal Paswan was also present there and they have put signature over the same. This witness has further been examined on those points about certification by the Doctor and he has stated in para 8 that the deceased was in fit state of mind to make statement. It is well settled principal that the person who recorded statement has to be satisfied as to whether the deceased was in fit state of mind and Pyare Paswan (P.W.2) and Gopal Paswan (P.W.5) have also been examined in this case and they have not been cross-examined to show that the deceased was not in fit state of mind. No doubt P.W.1 has stated in para 8 that after injury the deceased was unconscious condition but there is nothing to show that he was in unconscious condition in the hospital also. As such so far dying declaration is concerned this is admissible and that clearly



shows that the deceased was assaulted by Kali Paswan by *Saif* on his forehead causing injury on his forehead over left eye and thereafter assaulted by Rajendra Paswan by *Garasa* in the middle finger of left hand, Mahesh Paswan assaulted with *Saif* on leg and all the other accused persons assaulted him by *lathi*. The aforesaid fardbyena which is Ext.1 has been corroborated by the evidence of P.Ws. 1, 2, and 5 and they have also supported the manner of occurrence as alleged in the fardbeyan and those witnesses have been cross examined also. No doubt P.W.1 and 2 are son and daughter-in-law of the deceased and on that score their evidence can not be brushed aside rather their evidence requires close scrutiny and their evidence found further corroboration from the evidence of P.W.5 an independent witness, who has also supported the prosecution case about the manner of occurrence and has categorically stated in para 6 that in his presence Kali Paswan assaulted with *Saif* on his head causing injury on the forehead and above left hand, Rajendra Paswan assaulted with *Garasa* in the middle finger of left hand, Mahesh Paswan assaulted with *Saif* on leg and he was assaulted indiscriminately by the other accused persons.

15. Considering the evidence as discussed above, there appears sufficient cogent and reliable evidence so far manner of occurrence is concerned, however, the Doctor has not been examined though the evidence of C.W.2 who has proved the postmortem report



shows that he was at Nawada but he has not been examined and the postmortem report has not been proved by the other Doctors rather it has been proved by the Pharmacist, who is not expert and furthermore there is nothing in his evidence to show that he had occasion to work with Dr. Ram Pratap Singh i.e. the Doctor who conducted autopsy. In such view of the matter, the postmortem report does not appear to be admissible in the eye of law. There is evidence that all the accused persons assaulted by different arms and the injuries caused by one *Garasa* on the vital part of the body. In the present case it appears that all the accused persons variously arms came and assaulted the deceased and motive is said to be altercation between them earlier but motive is not so strong to show and that the accused persons came with an intention or with knowledge to cause death of the deceased they assaulted with having knowledge that it will cause his death.

16. Considering the facts and circumstances as stated above, conviction of the appellants under Section 304 (part II) does not appear to be convicting rather facts and circumstances as discussed above and as the Doctor has not been examined and there is no admissible evidence available to show that injuries on the person of deceased was sufficient in ordinary course of nature to cause his death, as such at best the appellants can be convicted under Section 325 with the aid of Section 149 of the IPC.

17. Considering the facts and circumstances, this Appeal is



partly allowed. Conviction of the appellants under Section 304 (Part II) read with Section 149 is modified to conviction under Section 325/149 of the IPC. At this stage learned Amicus Curiae has submitted that the appellants except Mahesh Paswan have remained in custody for about ten months and Mahesh Paswan remained in custody for three months and the occurrence is of the year, 1987 as such 30 years long period has passed and the appellants have suffered mental agony due to pendency of the trial and appeal, as such lenient view may be taken and the period will be modified to the extent already undergone by them. There is no force in the above argument.

18. Accordingly, the conviction is modified under Section 325/149 of the IPC and their sentence is reduced to the period already undergone by them.

19. With the aforesaid modification, this appeal is disposed of.

20. The office is directed to hand over the first page and the last page of the judgment to Ranbir Singh, Amicus Curiae.

(Vinod Kumar Sinha, J)

chn/-

AFR/NAFR	AFR
CAV DATE	N/A
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