

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.980 of 2012

Arising Out of PS.Case No. -31 Year- 2005 Thana -null District- PURNIA

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Harsha, Son of Zobin, resident of Radampur, P.S- Kochadhaman, District-
Kishanganj. Appellant.

Versus

The State of Bihar. Respondent.

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Appearance :

For the Appellant : Ms. Anukriti Jaipuriyar, Amicus Curiae
Mr. Ajit Ranjan Kumar, Advocate
For the State : Mr. A.K. Sinha, A.P.P.
For the Informant : Mr. Durga Nand Jha, Advocate.

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CORAM: HONOURABLE DR. JUSTICE RAVI RANJAN

And

HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL)

Date: 13-03-2018

Heard learned counsel for the appellant and Ms. Anukriti Jaipuriyar, learned amicus curiae appointed in this appeal, learned A.P.P. for the State and learned counsel for the informant.

2. This criminal appeal has been preferred against the judgment and order of conviction dated 09.08.2012 and order of sentence dated 14.08.2012 passed by the Ad hoc Additional Sessions Judge No.5, Purnea in Sessions Trial No.10 of 2008, arising out of Rauta P.S. Case No.31 of 2005, whereby the learned trial Court acquitted Khunkhunias alias Razzak and convicted the appellant-Harsha under Section 302 of the Indian Penal Code (hereinafter in short referred to as 'IPC') and Section 27 of the Arms Act and sentenced him to undergo rigorous



imprisonment for life and also slapped him with a fine of Rs.10,000/- and in default of payment of fine further sentenced to undergo simple imprisonment for two months under Section 302 IPC and also sentenced him to undergo rigorous imprisonment for three years under Section 27 of the Arms Act and slapped him with a fine of Rs.5000/- and in default of payment of fine further sentenced to undergo simple imprisonment for one month. All the sentences were directed to run concurrently.

3. The factual matrix of the case is that Rauta P.S. Case No.31 of 2005 was instituted under Section 302/120B/34 IPC and Section 27 of the Arms Act on the basis of fardbeyan of Md. Ansar Alam, son of Late Md. Sharif, recorded by S.I. Uday Bahadur Officer-in-Charge of Rauta Police Station at the door of the informant at village Sukarna on 20.05.2005 at 10:30 PM with the allegation in succinct that on 20.05.2005 at 5:45 PM his brother Md. Nasim and his friend Margoob Alam were chatting sitting on the flank of the road near Sukarna bridge towards south of his house. In the mean time, 15-20 miscreants arrived there and exploded the bomb. Listening the explosion sound he rushed to the south of his house and witnessed accused Kasim, Mahboob, Hasim and Harsha were resorting firing upon his brother Nasim while Shankar, Chamanlal, Amanlal Harijan, Poresh, Gopal,



Vijay, Bano, Basudeo, Raju and Fasudeo resorting firing on Margoob Alam slitting his neck. He could not identify rest of the accused persons in the occurrence. All the villagers witnessed the occurrence. When he begged for his brother Md. Kasim and Harsha uttered to gun him down also and extended threatening of dire consequences to his entire family members in case of lodging the case. The informant has claimed that the aforesaid accused persons in association of some unknown miscreants hatching conspiracy gunned down his brother Nasim and his brother Margoob Alam.

4. The aforesaid case was investigated by the police and on conclusion of investigation I.O. submitted supplementary chargesheet under Section 302/120-B/34 of IPC and Section 27 of the Arms Act against accused Harsha, Nazim and Rajjaque @ Khunkhunua.

5. On receiving the case diary and chargesheet and perusing the same, the learned Magistrate took cognizance of the offence and committed the case to the Court of Sessions. The learned Magistrate split up the record of Nazim as he was not produced before the Court from jail and committed the case of Harsha and Rajjaque @ Khunkhunua to the Courts of Sessions. After commitment and on transfer the case finally came in seisin



of learned Ad hoc Additional Sessions Judge No.5, Purnea for trial.

6. Charge under Section 302 & 120-B IPC and Section 27 of the Arms Act was framed against the accused persons. Charge was read over and explained to the accused persons to which they pleaded not guilty and claimed to be tried.

7. To substantiate its case, in ocular evidence, the prosecution has examined altogether ten prosecution witnesses, namely, Monsin as P.W.1, Md. Yasin as P.W.2, Md. Rehan as P.W.3, Pavan Lal as P.W.4, Zahid Alam as P.W.5, Md. Monazir as P.W.6, Md. Nazim as P.W.7, Majaharool as P.W.8, Nazmeen Begum as P.W.9 and Dr. Ajay Kumar who conducted the autopsy of cadaver of the deceased as P.W.10. Out of the aforesaid witnesses P.Ws.1, 4, 5, 6, 7 and 8 turned hostile. In documentary evidence the prosecution has filed and proved some documents.

8. Statement of the accused persons was recorded under Section 313 Cr.P.C. The case of the defence is complete denial of the occurrence claiming himself to be quite innocent. The defence has not adduced any ocular or documentary evidence in buttress of its case.

9. After hearing the parties and perusing the record, the learned trial Court passed the impugned judgment and order of



conviction and sentence as detailed in earlier paragraph.

10. Being aggrieved and dissatisfied with the impugned judgment and order of conviction and sentence, the convict Harsha has preferred this criminal appeal.

11. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charges levelled against the appellant beyond all shadow of doubt or not.

12. It is submitted by learned counsel for the appellant and learned amicus curiae that F.I.R. has not been exhibited by the prosecution and informant has not been examined by the prosecution and due to non-examination of informant, the prosecution case does not stand proved. I.O. of the case has also not been examined by the prosecution and for non-examination of the I.O. great prejudice has been caused to the defence as finding of blood, remains of bomb and cartridge at the place of occurrence could not be established and contradiction between the statements of the witnesses given before the Court and that before the I.O. under Section 161 Cr.P.C. could not be corroborated. For non examination of the I.O. place of occurrence also does not stand established by the prosecution. There is no eye witness of the occurrence. Moreover, P.W.9 who also does not happen to be eye witness of the occurrence rules out P.Ws.2



& 3 to be eye witnesses of the occurrence. It is further submitted that P.Ws.2, 3 & 9 happens to be the family members of the deceased and as per the prosecution case several villagers had witnessed the occurrence but none of the villagers has been examined by the prosecution and no plausible reason has been assigned by the prosecution for their non-examination which creates serious doubt about the prosecution case. Thus, the prosecution has utterly and miserably failed to establish the prosecution case beyond all reasonable doubt. Hence, the appellant is entitled to be acquitted.

13. On the other hand, learned A.P.P. for the State and learned counsel for the informant, advocating the correctness and validity of the impugned judgment and order of conviction and sentence submitted that though the informant has not been examined by the prosecution but P.Ws.2, 3 & 9, who happens to be eye witness of occurrence have fully supported the prosecution case. The ocular evidence also stand corroborated by medical evidence and the learned trial Court, after correctly appreciating the facts of the case and material available on record, has rightly passed the impugned judgment and order of conviction and sentence, which is liable to be upheld and this appeal is shorn of merit and is liable to be dismissed.



14. From perusal of record, it appears that the informant of the case has not been examined by the prosecution. To substantiate its case the prosecution has examined altogether nine prosecution witnesses. Out of them six witnesses, namely, P.W.1-Monsin, P.W.4-Pavan Lal, P.W.5-Zahid Alam, P.W.6-Md. Monazir, P.W.7-Md. Nazim and P.W.8-Majahrool turned hostile. While P.Ws.2-Md. Yasin and P.W.3-Md. Rehan claimed themselves to be eye witnesses of the occurrence and have made an abortive bid to support the prosecution case by stating in their examination-in-chief in consonance to the prosecution case but from perusal of testimony of P.Ws.2, who happens to be uncle of deceased and P.W.3, who happens to be son of deceased, it appears that they do not happens to be eye witnesses of the occurrence As P.W.2-Md. Yasin, who happens to be uncle of the deceased, has stated in his examination-in-chief that at the time of occurrence he was sitting at his door. He listened the explosion sound and responding the same his nephew rushed to the place of occurrence stepping out of the house. He also followed him and witnessed that Nasim was murdered there and 10-12 persons armed with gun congregated there. He witnessed Harsha resorting firing upon Nasim by means of gun but in examination-in-chief itself he has stated that at the place where he had rushed he had



found two dead bodies lying there one was of Nasim and another of Margoob Alam. Neck of Margoob was slitted. The aforesaid statement of P.W.2-Md. Yasin indicate that when he arrived at the place of occurrence he had found the dead body of Nasim and neck slitted dead body of Margoob Alam there, which means that he had arrived at the place of occurrence after culmination of the occurrence and had not witnessed the occurrence. Moreover in the said examination-in-chief he has not stated about witnessing of resorting of firing upon Margoob Alam by the appellant and he has also not stated as to who had slitted the neck of Margoob Alam. Moreover in para-6 of his cross-examination the said witness has stated that the place of occurrence is located within 250-300 ft. from his house. When he arrived at the place of occurrence, he had witnessed two dead bodies there who had died. The aforesaid statement of P.W.2 also eloquently rules him out to be eye witness of the occurrence.

15. P.W.2 has stated in para-5 of his cross-examination, that his nephew (informant) had rushed to the place of occurrence at first and he followed him four minutes later. He and his nephew rushed at the place of occurrence at first then others arrived there. The aforesaid statement of P.W.2 indicates that P.W.2 and his nephew i.e. informant had arrived at first at the



place of occurrence and thereafter other persons had arrived there and as per the account of P.W.2 when he arrived at the place of occurrence he found the dead body of Nasim and Margoob Alam there who had died. The aforesaid statement of P.W.2 candidly and explicitly rules out P.W.3 to be eye witness of the occurrence as P.W.3 had arrived at the place of occurrence later to informant and P.W.2 and alike P.W.2 he must have also not witnessed the occurrence at the place of occurrence rather the dead bodies of the aforesaid two persons there on his arrival. Moreover P.W.3 has stated in para-10 of his cross-examination that when he arrived at the place of occurrence, he found the miscreants surrounding his father, so he could not say as to whether his father was senseless or had died. The aforesaid statement of P.W.3 also eloquently indicates that he had not witnessed the occurrence of assault by the appellant upon the deceased.

16. Attention of P.W.2 in para-8 of his cross-examination and that of P.W.3 in para-6 of his cross-examination was drawn by the defence towards contradiction between their statements given before the Court and that given before the I.O. under Section 161 Cr.P.C. regarding complicity of the appellant in the occurrence, slitting of neck of Margoob Alam, extending threatening of dire consequences by the appellant and Md. Kasim



to him and his family members, identification of the appellant along with other accused persons in the occurrence but I.O. has not been examined by the prosecution to corroborate the aforesaid contradiction and the prosecution has not assigned any plausible reason for non examination of the I.O. From perusal of the statements of P.Ws.2 & 3 recorded by the I.O. under Section 161 Cr.P.C., we find that the statement given by the aforesaid witnesses before the Court regarding the aforesaid aspects of the case stand in quite contradiction to that given before the I.O. under Section 161 Cr.P.C. and the aforesaid witnesses appears to have taken altogether different stand before the Court regarding the aforesaid aspects of the case.

17. When the I.O. of the case is not examined by the prosecution and the attention of the witnesses has already been drawn towards their earlier statements and the Investigating Officer could not be brought to give his evidence, then in our considered opinion, the Court can peruse the case diary and find out as to whether or not the attention of the witnesses towards their previous statements were correctly drawn and to satisfy itself as to whether or not they had given similar statement before police. There are two parts of the case diary. First part contains such portion of the diary in which the Police Officer has recorded



statement of the witnesses, about the incident or about other relevant facts which to that Police Officer, would be hearsay. The Second party of the case diary contains that portion in which the Police Officer has himself seen or heard a particular fact and has recorded a fact out of his own perception. To this category would come recording about the inspection of place of occurrence making of seizure of certain incriminating articles or in some cases, when the Police Officer reaches the place of occurrence where the occurrence has not finished and he sees himself whole or part of the occurrence, recording of that. The latter part of the case diary cannot be used by the Court unless the Investigating Officer is examined because that would amount to using that portion of the case diary as evidence. Only the Investigating Officer can tell the Court in witness box as to what were his findings out of his own perception, so that he can be put to cross-examination over that. However the first part of the case diary consists, as already noted, the statement recorded by the witnesses. If the Investigating Officer comes to the Court for evidence and if he is asked to confirm those portion of the statement of the witnesses to which the attention of the witnesses was drawn, the Investigating Officer will say only what he has recorded as his statement in the case diary and cannot go beyond



that. Now, the question is, whether that portion of the case diary can be looked into by the Court and used in the trial to aid the Court in reaching at a correct decision when the Investigating Officer is not brought before the Court. Sub-Section (2) of Section 172 of Cr.P.C. provides that the Court cannot only call for the case diary but may also use such diary to take aid in such trial. If the Court only has the power to look into the case diary and whatever it peruses to keep it only in mind and then to proceed to record the judgment keeping such impression only in mind that, in our opinion, cannot be the intention of the legislation. In our considered opinion, if the Court peruses any such things and uses it to its aid in trial, this must go in black and white as part of the judgment. The only limitation is that the court cannot use any portion of the case diary as evidence. In view of the aforesaid proposition of law and in view of the contradiction between the statements of P.W.2 and P.W.3, as recorded before the court and that given before the I.O. under Section 161 Cr.P.C., the testimonies of the aforesaid witnesses given before the court do not inspire our confidence to hold the conviction of the appellant relying upon the same.

18. P.W.9-Nazmeen Begum, who happens to be wife of the deceased, also does not appears to be eye witness of the



occurrence as in her examination-in-chief itself she has stated that at the time of occurrence she was at her house. She arrived at the place of occurrence responding the explosion sound and found two persons, namely, Md. Nasim and Margoob Alam died there. She did not witness their assailant as the miscreants had left the scene by the time of her arrival there. She has also failed to identify the appellant in the dock. The aforesaid statement of P.W.9 indicates that she had arrived at the place of occurrence after culmination of the occurrence and decamping of the accused persons from there and had not witnessed the occurrence of assault upon the deceased. The statement of P.W.9 also rules out P.Ws.2 & 3 to be eye witness of the occurrence as in para-2 of her cross-examination she has stated that she had arrived at the place of occurrence at first thereafter others arrived there. P.W.3-Md. Rehan and P.W.2-Md. Yasin had arrived there two minutes later to her arrival.

19. From perusal of the record, it appears that the aforesaid three witnesses happens to be family members of the deceased and as per the prosecution case all the villagers had witnessed the occurrence but none of the independent witness has been examined by the prosecution and the prosecution has also not assigned any plausible reason for their non-examination



hence adverse inference is drawn against the prosecution.

20. In the facts and circumstances of the case and the discussions made by us hereinabove, we find and hold that the prosecution has utterly and miserably failed to substantiate the prosecution case beyond all reasonable doubts by adducing consistent, trustworthy and reliable evidence. Hence, the impugned judgment and order of conviction and sentence passed by the learned trial Court is set aside and the appellant is acquitted from the charges levelled against him. As the appellant is in jail, he is directed to be released forthwith, if not wanted in any other case. Accordingly, this appeal is allowed.

21. Let a copy of first and last page of the judgment be furnished to the Amicus Curiae free of cost and the prescribed fee of the Amicus Curiae be paid by the Patna High Court Legal Services Committee.

(Dr. Ravi Ranjan, J.)

(Prakash Chandra Jaiswal, J.)

Trivedi/-

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