

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.660 of 2012

Arising Out of PS. Case No.-02 Year-2004 Thana- Sarairanjan District- Samastipur

Hari Shankar Chaudhary, son of Baleshwar Chaudhary, resident of Village-
Jitbarpur (Kumhara), P.S.- Sarairanjan, District- Samastipur.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant/s	:	Mr. Bijay Bhushan Prasad, Adv. Mrs. Vandana Singh, Adv.
For the Respondent/s	:	Mr. Mayanand Jha (APP)

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR
and
HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 01-02-2018

The present appeal was preferred by the sole appellant under Section 374 (2) read with Section 389 (i) of the Code of Criminal Procedure, 1973 (for short “Cr.P.C.”) against judgment of his conviction and sentence in Sessions Trial No. 950 of 2008 (arising out of Sarairanjan P.S. Case No. 02 of 2004). The appellant by judgment of conviction dated 22-05-2012 has been held guilty under Section 302 of the Indian Penal Code, 1860 (for short “I.P.C.”) and Section 27 of the Arms Act, 1959 and by order of sentence dated 28-05-2012, the appellant has been directed to undergo



imprisonment for life under Section 302 of the I.P.C. and further, he was sentenced to undergo rigorous imprisonment for 5 years under Section 27 of the Arms Act, 1959. All the sentences were directed to run concurrently.

2. Short fact of the case is that on 16-01-2004 at 9:15 AM (morning), Sub-Inspector of Police Sri Sanjay Kumar recorded *fardbeyan* of Asha Devi (P.W.4) wife of Ram Kumar Chaudhary (deceased) of village Jitbarpur (Kumhira), Police Station - Sarairanjan, District – Samastipur. The *fardbeyan* was recorded at *Bathan* of deceased Ram Kumar Chaudhary. In the *fardbeyan*, the informant (P.W.4) stated that on preceding night i.e. 15-01-2004, she alongwith all family members, after taking meal at about 9:00 PM, went for sleeping, but her husband Ram Kumar Chaudhary (deceased) as usual went for sleeping on a cot in *bathan*. In the night at about 2.30 hrs., she awoke after hearing three sounds of firing from the *bathan* side, thereafter, she ran towards the *bathan* and saw that her *farik* (*pattidar*) Hari Shankar Chaudhary (appellant) son of Baleshwar Chaudhary was fleeing away towards northern side, then she switched on her torch and raising alarm, started chasing him, however, he succeeded in



fleeing away. She further stated that thereafter she returned back to *bathan* and noticed that her husband Ram Kumar Chaudhary had already died due to fire-arm injury on his ribs. On her alarm as well as after hearing sound of firing, neighbours also arrived there. Till that time, Hari Shankar Chaudhary (appellant) had already fled away. The reason for the occurrence was explained by the informant that the appellant was regularly quarreling with his brother, in which, her husband was trying to mediate, due to this reason, the appellant was using filthy language against her husband, on the plea that the deceased was the reason for creating dispute in the family of the appellant. She further alleged that the appellant was always threatening for killing.

3. After recording *fardbeyan*, a formal F.I.R. was drawn on the same date i.e. on 16-01-2004 at 11:45 AM, vide Sarairanjan P.S. Case No. 02 of 2004, under Section 302 of the I.P.C. and Section 27 of the Arms Act, 1959 only against the appellant. At much belated stage on 13-09-2008, chargesheet was submitted against the appellant and after cognizance, the case was committed to the court of Sessions on 18-11-2008 and it was numbered as Sessions Trial No. 950 of 2008.



Thereafter, on 05-01-2009, charge under Section 302 of the I.P.C. and Section 27 of the Arms Act, 1959 was framed against the appellant.

4. To prove its case from the prosecution side, altogether 9 witnesses were examined. Out of them, the informant Asha Devi was examined as P.W.4. Her son Sushil Kumar Choudhary was examined as P.W.3. P.W.2 Bhavesh Kumar Chaudhary is the co-villager and P.W.1 Deepak Kumar Singh, who was resident of neighbouring village of informant, was examined as seizure list witness. The doctor, who conducted *post-mortem* examination on the dead body, namely Dr. Ajeet Kumar Sinha was examined as P.W.9 and in the case, P.W.5 Lok Nath Yadav, P.W.6 Jawahar Ram, P.W.7 Tej Narayan Singh and P.W.8 Sanjay Kumar were examined as investigating officers. However, major portion of the case was investigated by P.W.8 Sanjay Kumar. After closure of the prosecution evidence, circumstances collected against the appellant was explained to him on 29-03-2012 and his statement under Section 313 of the Cr.P.C. was recorded, in which, he denied his involvement.



5. Sri Bijay Bhushan Prasad, learned counsel for the appellant, after placing entire evidence, has argued that it was a case on 'No Evidence', however; the learned Trial Judge incorrectly relying on the evidence of mainly P.Ws. 2, 3 and 4 has passed the judgment of conviction and sentence. It has been argued that in the case, though informant had claimed to be a witness, as if, she had seen the appellant fleeing away after the occurrence, her evidence is not believable, since the informant herself had admitted that she got up only after hearing the sound of firing. At the time of firing, she alongwith others was sleeping in the house, whereas, the deceased was sleeping in *bathan*. After hearing the sound of firing, she claims that she came out with a torch and in the torch-light, she identified the appellant, whereas, she herself had admitted that it was dark and foggy night. It has also been argued that though identification of the appellant was based in the light of torch, neither during investigation nor during trial, said torch was produced and in absence of production of source of identification, there is no meaning of identification of the appellant by the informant that too in dark and foggy night. By way of referring to evidence of P.W.2 Bhavesh



Kumar Chaudhary, who was co-villager, it has been argued that this witness during trial had stated, as if, he alongwith other co-villagers had chased the appellant and identified him, however; when his attention to his previous statement was drawn, it was found that such fact was not stated by him during investigation. Learned counsel for the appellant further submits that evidence of P.W.3 Sushil Kumar Chaudhary, son of the deceased may also not be believed, since the informant in her *fardbeyan* had made categorical statement that after hearing sound of firing she came out and with torch, she chased the appellant, however; the appellant succeeded in fleeing away, thereafter, she returned back to the place of occurrence and only thereafter, other witnesses had arrived there but she did not disclose name of this witness. According to learned counsel for the appellant, in view of evidence of P.W.4 itself, the presence of P.W.3 appears to be doubtful. Regarding evidence of P.W.1 Deepak Kumar Singh, it has been argued that he stood as witness to the seizure list relating to recovery of two खोखा (khokhas) of .315, which were shown to be found in the *bathan*, this witness himself accepts that he was not resident of same locality, but he was residing about



one and half kilometer away from the place of occurrence. It has been argued that even on the seizure list, the investigating officer had not bothered to get signature of co-villager of the informant. By way of referring to evidence of P.W.8 Sanjay Kumar (1st investigating officer), it has been argued that this witness, in his evidence, has accepted that he had not found even blood mark on the cot, on which, dead body of the deceased was found. Accordingly, it has been argued that in the present case, the prosecution had miserably failed to prove the place of occurrence. It has further been argued that it appears that the deceased was done to death at different place and subsequently, his dead body was put on cot and thereafter, in a pre-planned manner, the appellant was falsely implicated since the appellant was son of the step brother of the deceased. On aforesaid ground, learned counsel for the appellant has prayed for setting aside the judgment of conviction and sentence.

6. Sri Mayanand Jha, learned Addl. Public Prosecutor has opposed the appeal and he submits that evidence of P.W.4/informant may not be questioned. He submits that the informant immediately after hearing the sound of firing came



out and in the torch light, she identified the appellant. It has further been argued that informant (P.W.4) had stated in her evidence that she had also chased the appellant, however; the appellant succeeded in fleeing away. He further submits that the prosecution story has also not been corroborated by the medical evidence. By way of referring to the Ext. 7 i.e. *post-mortem* examination report, he submits that the story of the prosecution that in the occurrence, three firing was shot is not corroborated, in view of the fact that on the dead body of the deceased, only one entry wound of fire arm was noticed by the doctor.

7. Besides hearing learned counsel for the parties, we have minutely perused the evidence available on record, both oral and documentary. After going through the entire evidence, *prima facie*, we are of the opinion that prosecution had not proved its case beyond all reasonable doubt. Before proceeding, it would be necessary to firstly examine the evidence of the informant, who is P.W.4 and wife of deceased and has proved her signature on the *fardbeyan*, which was marked as Ext. 3.



8. In paragraph 1 of her evidence, the informant (P.W.4) had stated that she identified the appellant while he was fleeing away. In paragraph – 2 of her cross-examination, she accepted that father of the appellant was step brother of her husband (deceased) and in paragraph – 3, she accepts that there was no cordial relation with accused, since they were not in visiting term. In paragraph – 7, she states that she woke up after hearing the sound of firing from the *bathan* side, where her husband was sleeping. She accepted that on blanket, there was no blood mark, but there was hole of bullet and it was also burnt. In paragraph – 8, she stated that at the place of occurrence, only one खोखा of bullet was found and her husband was wearing *kurta* and there was hole in chest only. In paragraph 9, she further clarified that before her arrival at the place of occurrence, none had come and only after hearing her alarm, her son Sushil (P.W.3) came running. At this juncture, it is necessary to indicate that once this witness had categorically stated that P.W.3 had arrived after she returned back to the place of occurrence after chasing the appellant, there was no question of identification of the appellant by P.W.3 while allegedly the appellant was shown as fled away. She further



accepts in paragraph 11 that she had not shown torch to the officer incharge nor Daroga Ji had asked for torch. She further stated that it was cold and foggy night. She denied the suggestion that in connivance with appellant's enemy in the village, the appellant was falsely implicated by the informant.

9. P.W.2 Bhavesh Kumar Choudhary is the co-villager and he deposed that he also woke up after hearing three sound of firing and thereafter, he went towards western side and saw that Ram Kumar Chaudhary had received fire-arm injury on his chest and he was told by the informant/P.W.4 that her husband was done to death by the appellant Hari Shankar Chaudhary by giving fire-arm injury and the accused had fled towards eastern side. He stated that thereafter, he alongwith co-villager Jai Ram Choudhary, Kedar Chaudhary and Chote Chaudhary also chased the appellant, however; the appellant succeeded in fleeing away. It is relevant to observe that though, he had stated that he alongwith other three had chased the appellant, the other three persons namely Jai Ram Choudhary, Kedar Chaudhary and Chote Chaudhary were not examined, as prosecution witness. Moreover, in view of his evidence in paragraph 1 itself, it is clear that he reached the



place of occurrence, where the husband of the informant was lying after getting fire-arm injury and thereafter, he proceeded for chasing for appellant appears to be not believable, since the informant had stated that firstly she had chased the appellant, who succeeded in fleeing away and thereafter, she returned back to the place of occurrence. Even his (P.W.2) attention was drawn to his previous statement as to whether such fact was made before the investigating officer or not, however; while examining the evidence of investigating officer i.e. P.W.8, the P.W.8 in paragraph 10 had categorically stated that no such statement was made by this witness (P.W.2). It appears that subsequently P.W.2 Bhavesh Kumar Chaudhary was introduced to develop the prosecution story. Accordingly, his evidence may not be treated as truthful. On examination of his disclosure in paragraph 3 of cross-examination, whereby this witness had developed a story that the appellant was chased by number of villagers and he had given name of such villagers like Gopalji Choudhary, Sitaram Chaudhary, Vijay Choudhary, Ganesh Chaudhary, Ram Sagun Chaudhary, Kailash Chaudhary etc., however; none of those persons were examined as witness by the prosecution nor such



fact is in consonance with the deposition of P.W.4/informant, who in her evidence had made specific statement that she herself had chased the accused and thereafter, she returned back. This fact also finds place in the *fardbeyan*.

10. The prosecution case further does not find support from the medical evidence. Ofcourse, it was case of the prosecution that three firing was shot on the person of the deceased, only one entry wound injury was found and from the dead body, one bullet was also recovered, however; reference has been made regarding two abrasions.

11. P.W.9 Dr. Ajit Kumar Sinha was posted on 16-01-2004 as Medical Officer, Sadar Hospital and on the same date at 11:55 A.M., he conducted *post-mortem* examination on the dead body of the deceased and he noticed following injuries/facts:-

“(i) Abrasion Below ® Axilla 1.5” x 1/3”.

(ii) Another abrasion just by the side of injury no. (i) 1” x 1/3”

(iii) injury over chest already mentioned in column (ii).

Internal finding:- On opening of skull brain was intact & pale. On dissection of neck, it was intact, trachea pale – intact.

On dissection of thronic cavity – finding already mentioned in pre-paragraph.



Abdomen – All organs intact & pale other than spleen injured. Diaphragm over the left side having opening (1.5” x 1” x 1/3”)

One Bullet detected from left thoracic cavity 1.23 length approx./ it was preserved.

Time elapsed since death & P.M. held – within 24 hours.”

The doctor has opined that the cause of death is due to haemorrhage and shock, as a result of above-noted injuries caused by some fire-arm. He proved the Post Mortem Examination Report, which was marked as Ext. 7.

12. During trial, four police officers were examined as investigating officers, but since other police officers i.e. P.W.5, 6 and 7 had not done any relevant job in the investigation, there is no need to discuss about their evidences. On examination of evidence of P.W.8 Sanjay Kumar, Sub-Inspector of Police, it is evident that in his evidence, he deposed that on 16-01-2004 at about 8:30 AM (morning) he got an information that in the village Jitbarpur Kumhira, one person was killed. To verify the said information, he proceeded for Jitbarpur Kumhira village alongwith P.W.5 Lok Nath Yadav, A.S.I. and other force and reached village at 9:15 hrs. in the morning and thereafter, he recorded *fardbeyan* of



P.W.4 and he proved the *fardbeyan*, which was marked as **Ext. 5**. He also prepared inquest report in respect of the dead body of the deceased, which was show to be found on a cot in *bathan* of the informant. The said inquest report was marked as **Ext. 6**. The investigating officer in *bathan* also found two खोखा of .315 cartridges and prepared a seizure list. The said seizure list was marked as **Ext. 4**. The investigating officer in paragraph 4 of his evidence has given description regarding place of occurrence, which was *bathan* of the deceased. However, in paragraph 8 of his cross-examination, he stated that in the case diary, he had not recorded as to whether he had found blood on the floor at the place of occurrence nor he had seen the blood mark even on cot. This fact was also not recorded in the case diary. He was very categorical that no blood mark was found on the cot. He does not recollect as to whether at the place of occurrence, he had noticed any blanket or he had seized any clothes soaked with the blood. Meaning thereby that the investigating officer had not at all noticed any blood mark at the place of occurrence.

13. On examination of his evidence, the Court is in agreement with the submission of learned counsel for the



appellant that the prosecution has not been able to prove the place of occurrence.

14. Similarly, the seizure list in relation to finding of two खोखा of .315 bullet also appears to be doubtful, particularly; in view of the fact that none of the villager of the informant had come forward claiming to be witness to the seizure list, however; in the present case, one person from different village had put his signature and he was examined as P.W.1. If it was case of the prosecution that the husband of the informant was given three shot of firing while he was sleeping on his cot and he died and his dead body was also found on the cot, there was no reason not to find any mark of blood either on the floor where on cot the deceased was lying or on the cot itself. It is case of the prosecution that the deceased was given gun shot injury at 2:30 hrs. in night and from the time of injury and death, the body was lying on the cot at the place of occurrence itself and thereafter, inquest report was shown to be prepared at 9:30 AM. Even then, the investigating officer had not noticed blood mark either on floor or on cot or on any cloth. This creates serious doubt regarding the place of occurrence itself.



15. Though, P.W.4, wife of the informant, had claimed that she identified the appellant while fleeing away with the aid of her torch-light, but the torch was neither produced during investigation nor during the trial. It is relevant to indicate that a Division Bench of this Court in a case reported in **1990 (1) PLJR 755 (Mangal Singh and ors. Vs. State of Bihar and ors.)** has already held that non-production of source of identification during the trial creates serious doubt on the prosecution case. It would be appropriate to quote paragraph nos. 30 and 31 of the judgment, which are as follows:-

“30. There are contradictory statements of PWs 3 and 4 so far as means of identification is concerned. PW 4 in the F.I.R. has said that he flashed the torch and in its light identified the assailant. There is no whisper of any electric bulb light in the F.I.R. but PW 3 has said that he also identified the assailant in the electric light. In the F.I.R. PW 4 has said that he flashed the torch light and in the court he has stated that he showed the said torch to the I.O. which has been denied by the I.O. P.W. 9. In this connection it is also relevant to state here that PW 3 has done a step further that besides torch light, he also identified the accused persons in the light of electric bulb which was burning on the electric pole near the place of occurrence. The means of identification i.e. torch has



not been produced either in the court or during the course of investigation before I.O. as stated by him. Therefore, the factum of identification also becomes doubtful. In this connection reference may be made to a decision in the case of **Amirchand Ahir and others vs. State of Bihar, 1977 B.B.C.J. 400**, where it has been held that non- production of the only means of identification, namely, the torch in question in the present case, makes the prosecution case all the more doubtful. The Hon'ble Supreme Court in the case of **State of Uttar Pradesh vs. Hari Prasad and others A.I.R. 1974 S.C. 1740** has observed that where the occurrence had taken place in a dark night and witnesses claimed to have identified the accused in the light of a lantern, the existence whereof had been found to be doubtful, the accused was entitled to the benefit of doubt. In the instant case, the means of identification has not been produced in the court or during the course of investigation. Therefore, on this ground also, in our opinion, the appellants are entitled to the benefit of doubt.

31. According to the prosecution case, the death was caused by two shots, one by rifle and the other by gun but the doctor PW 5, who has been examined in the court did not find any gun shot injury. He found only projectile injury of rifle on the person of the deceased. He has categorically stated in the court that there was only one injury caused by one shot. Therefore, the manner of occurrence as stated in the F.I.R. does not find corroboration from the objective finding of the doctor who held the post mortem examination. It is well settled that where evidence falls



short of absolute prove or in other words, the decree of proof necessary to establish the charge fully is lacking and consequently some scope remains for doubt, in such a case, the principle of benefit of reasonable doubt is invoked.”

16. It is case of the prosecution that occurrence had taken place in cold, dark and foggy night and in such situation, the claim of the informant to identify the appellant, that too that she woke up after hearing gun shot sound and noticed that the appellant was fleeing away, appears to be doubtful and not believable. Moreover, source of identification has not been produced during the trial and as such, it is difficult to rely on the evidence of the informant/P.W.4 on the point of identification. So far as claim of identification of appellant by other witnesses, as discussed hereinabove, is concerned, it may not be treated as truthful.

17. In view of facts and circumstances, we are of the opinion that prosecution had not proved its case beyond all reasonable doubt and as such, the judgment of conviction and sentence in the present case is required to be interfered with.

18. Accordingly, the judgment of conviction and sentence dated 22-05-2012 and 28-05-2012 respectively



passed in Sessions Trial No. 950 of 2008 (arising out of Sarairanjan P.S. Case No. 02 of 2004) by Sri Arunendra Singh, learned Additional District & Sessions Judge, Fast Track Court No.1, Samastipur is, hereby, set aside and appeal is allowed. Since the appellant is in custody and his conviction and sentence has been set aside, it is, hereby, directed to release him forthwith, if not wanted in any other case.

(Rakesh Kumar, J.)

(Arvind Srivastava, J.)

Anay

AFR/NAFR	A.F.R.
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