

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.406 of 1994

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GOPAL MANDAL S/o Singeshwar Mandal, resident of village Kharihara,
P.S. Barahat, District Banka

... .. Appellant/s

Versus

STATE OF BIHAR

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr.Sujit Kumar Singh, *Amicus Curiae*
For the Respondent/s : Mr. Shiwesh Ch. Mishra, A.P.P.

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**CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA**

and

HONOURABLE MR. JUSTICE PRABHAT KUMAR SINGH

ORAL JUDGMENT

**(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA)**

Date : 16-08-2019

Heard Sri Sujit Kumar Singh, Advocate, learned
Amicus Curiae, appearing for appellant as well as learned
Additional Public Prosecutor Sri Shiwesh Chandra Mishra
appearing for the State and perused the records.

2. This criminal appeal has been preferred
against the Judgment of conviction and sentence Order dated
6.7.1994 and 7.7.1994 respectively passed by learned IInd
Additional Sessions Judge, Banka, in Sessions Case No.
131/92 by which and whereunder he convicted the sole
appellant for the offence punishable under Section 302 of the
Indian Penal Code and, accordingly, sentenced him to



rigorous imprisonment for life thereunder. However, by the same impugned judgment, three persons, namely, Sharwan Mandal, Diwakar Mandal and Dilip Mandal were acquitted of the charge framed against them for the offence punishable under Section 302/34 of the Indian Penal Code.

3. Briefly stated the prosecution case is that P.W. 5 Anirudh Mandal gave written report to Officer-in-charge of Barahat Police Station on 15.5.1991, to this effect, that on the same day at about 5:00 A.M. while his wife Bhama Devi was sweeping courtyard, appellant Gopal Mandal along with acquitted accused Dilip Mandal, Diwakar Mandal and Sharwan Mandal came in the courtyard of informant and Dilip Mandal took out Rs. 5000/- from a pot. The appellant was carrying *Harish* in his hand. The informant's wife raised objection upon which appellant Gopal Mandal gave *Harish* blow on the head of informant's wife, as a result whereof, her head broken and again appellant gave *Harish* blow on the temple of informant's wife. Informant's wife having sustained aforesaid injuries fell down on the ground and died after sometime. The reason behind the alleged occurrence, as averred in the written report of P.W. 5, that his aunt, namely, Sabitri Devi (P.W. 2), was residing with informant (P.W. 5) and



she wanted to give her lands to P.W. 5, which had caused announce to appellant, who happens to be the cousin brother of P.W. 5 and that is the reason the appellant and his associates wanted to kill P.W. 2 Savitri Devi but they could not succeed to trace her out, at the time of alleged occurrence, and, thereafter, in anger, they committed murder of informant's wife.

4. On the basis of written report of P.W. 5, Banka P.S. Case No. 130/91 was registered and on the same day at 3.30 P.M. formal F.I.R. was drawn up against appellant and others for the offences punishable under Sections 448, 302, 34 and 380 of the Indian Penal Code

5. After investigation, police submitted charge-sheet against the appellant and others and, thereafter, cognizance was taken and the case was committed to the court of sessions, in usual way.

6. The appellant and three others were put to trial in Sessions Case No. 131/92 and, accordingly, appellant as well as others stood charged for the offence punishable under Section 302/34 of the Indian Penal Code to which appellant as well as others denied the charge and claimed to be tried.



7. In course of trial, prosecution examined, altogether, 7 prosecution witnesses and also got exhibited some documents.

8. The statements of appellant and others were recorded under Section 313 of the Cr.P.C., in which they reiterated their innocence and they claimed their false implication. No evidence was adduced on behalf of the appellant as well as other accused in support of their defence but from perusal of statements recorded under Section 313 of the Cr.P.C. as well as cross-examination of the prosecution witnesses, we find that the defence of the appellant and others was totally denial of the prosecution story.

9. Learned trial court after scanning and evaluating the evidences available on the record passed the impugned judgment against which this criminal appeal has been preferred.

10. Learned *Amicus Curiae* appearing for the appellant assailed the impugned judgment of conviction and sentence order, arguing that the learned trial court completely failed to appreciate the prosecution evidence available on the record in its right perspective. He, further, submitted that written report of P.W. 5 goes to show that the alleged



occurrence took place in the courtyard of deceased in early morning and written report of P.W. 5 does not disclose the presence of any person in the courtyard of P.W. 5 but in course of trial P.W. 2, P.W. 3, P.W. 4 and P.W. 5 claimed themselves to be eye witness. He, further, submitted that in the written report of P.W. 5, it has, specifically, been mentioned that the appellant and others had gone in search of P.W. 2 Savitri Devi but she was not present in the courtyard of deceased but when P.W. 2 was examined before the trial court, she claimed that she was present at the place of occurrence.

11. Learned *Amicus Curiae*, further, submitted that P.W. 3 and P.W. 4 also claimed themselves to be eye witness but both the aforesaid prosecution witnesses are stranger to the family of P.W. 5 and their presence over the place of occurrence in such an early hour of morning appears to be doubtful. He, further, submitted that there are so many contradictions and improvements in the evidence of prosecution witnesses but Investigating Officer was not produced by the prosecution, which caused serious prejudice to the defence as the defence deprived from bringing the relevant improvements in the testimonies of the prosecution witnesses before the court and, therefore, on account of the



aforesaid reason the impugned judgment of conviction and sentence order cannot sustain in the eye of law.

12. On the other hand, learned Additional Public Prosecutor supported the impugned judgment of conviction and sentence order, arguing that P.W. 2, P.W. 3, P.W. 4 and P.W. 5 very, specifically, stated that it was appellant Gopal Mandal, who gave twice *Harish* blow to deceased as a result of which deceased died. Learned Additional Public Prosecutor, further, submitted that P.W. 6 found injuries on the head and temple of the deceased and the postmortem report of deceased corroborates the claim of P.W. 2, P.W. 3, P.W. 4 and P.W. 5.

13. Having heard the above stated contentions of the parties, we went through the records along with the lower court records.

14. P.W. 1 Jitendra Mandal is a hearsay witnesses. This witness states that having heard the noise, he went to the place of occurrence where he found deceased lying in her courtyard and the blood was oozing out from her head. This witnesses, further, claims that P.W. 4 Shankar Mandal told to him that it was appellant, who had assaulted the deceased. He, further, claimed that appellant Gopal Mandal



was present over the place of occurrence but he did not see anything in the hand of appellant Gopal Mandal. On being cross examined, this witnesses admitted that on the alleged date of occurrence, he had gone to court at 5:30 A.M. and returned to his home at 5:00 P.M.. This witnesses, further, admitted that while he was at his home, he heard noise at about 6:00 P.M. and having heard the noise, he went to the place from where the noise was coming out. This witnesses, further, admitted that the *Bari* of deceased Bhama Devi was at north and west corner of her house and he had seen the dead body of Bhama Devi lying in the said *Bari*. The perusal of statement of this witnesses goes to show that when he reached at the *Bari* of deceased Bhama Devi, he saw the dead body of the Bhama Devi lying in the said *Bari* and that time appellant Gopal Mandal was present there but he was carrying nothing in the hand. Furthermore, the statement of this witness reflects that he had seen the dead body of deceased at 6:00 P.M..

15. P.W. 2 Sabitri Devi is the aunt of informant and according to claim of P.W. 5, the appellant and his associates wanted to kill P.W. 2 Sabitri Devi. The written report of P.W. 5 has been exhibited as Ext. 2 and the written report of P.W. 5 does not speak that at the time of alleged



occurrence, P.W. 2 was also present on the place of occurrence .

16. P.W. 2 Sabitri Devi claimed herself to be eye witness of the alleged occurrence but she admitted in her deposition that prior to this occurrence she had gone to her *Naihar* Jitnagar, which was at the distance of 40 – 45 Miles from the village of the informant. She, further, admitted that there was enmity between appellant and P.W. 5. She also admitted that she was not interrogated by the police in respect of the alleged occurrence. The claim of P.W. 2 appears to be doubtful because the written report of informant does not say anything about the presence of P.W. 2 over the place of occurrence where the occurrence took place.

17. P.W. 3 Sitabi Mandal is co-villager of the informant (P.W. 5) and this witness claimed that having heard noise, he went to the place of occurrence where he saw the appellant and others, who were quarreling with the deceased Bhama Devi. This witness, further, claims that appellant and others were searching P.W. 2 and when they could not succeed to trace her out, the appellant assaulted deceased by means of *Ish*. This witness, further, claimed that the aforesaid occurrence was witnessed by him as well as P.W. 4. This



witness admitted in his cross-examination that after the occurrence, he went to the Police Station, where police took his signature on paper but his statement was not recorded by the police. However, this witness again stated that his statement was recorded by the police at his village. The attention of this witness was drawn towards his previous statement said to have been recorded by the police in course of investigation and this witness claimed to have made statement before the police as stated by him before this court. This witness, further, admitted in paragraph 11 of cross-examination that the alarm was raised when the accused persons left the place of occurrence and having heard the alarm raised after the occurrence, he as well as several other persons came there and when he reached at the place of occurrence, he saw the deceased lying dead. This witness admitted that he learnt at the place of occurrence about the occurrence. Admittedly, the Investigating Officer has not been examined and the defence could not get an opportunity to show before the trial court regarding the improvements made by P.W. 3 in his statement. Moreover, the presence of this witness at the time of alleged occurrence appears to be doubtful by the admission of this witness itself as this witness in his cross-



examination admitted that when he reached over the place of occurrence, the appellant and his associates had already left the place of occurrence.

18. P.W. 4 Shanker Mandal is son of P.W. 3. This witness also claims himself to be eye witness of the alleged occurrence. This witness claimed that having heard the noise, he went to the house of P.W. 5 and witnessed the alleged occurrence. This witness claimed that police seized the *Ish* and also prepared inquest report in his presence. This witness admits that he happens to be the nephew of P.W. 5. The attention of this witness was drawn towards his previous statement recorded by the police and this witness claimed that he had stated before the police that he had seen only appellant Gopal Mandal at the place of occurrence and Gopal Mandal was abusing and assaulting the deceased. This witness, too, admitted at paragraph 11 of his cross-examination that the alarm was raised when the appellant and his associates left the place of occurrence. This witness claims that at the time of occurrence, he as well as his father Sitabi Mandal (P.W. 3) and Anirudh Mandal (P.W. 5) were present over the place of occurrence. This witness, further, claimed that his mother as well as his wife were also present over the place of occurrence



but they were not examined by the police. This witness, further, claimed that place of occurrence was in courtyard of house of P.W. 5. The perusal of statement of this witness goes to show that this witness claims that he was present in the courtyard of P.W. 5 prior to the alleged occurrence but the written report of P.W. 5 does not say about the presence of P.W. 4 in his courtyard when occurrence took place and moreover, the presence of P.W. 4 in the courtyard of P.W. 5 in early morning of the alleged occurrence appears to be doubtful because this witness claims that having heard the noise, he went in the courtyard of P.W. 5, whereas P.W. 3 as well as this witness, too, admitted that alarm was raised when the appellant and his associates left the place of occurrence, therefore, the testimony of P.W. 4 appears to be doubtful.

19. P.W. 5 Anirudh Mandal is the informant as well as husband of deceased. This witness claims that at the time of alleged occurrence he was in his house and his wife (deceased) was sweeping the courtyard and in the meantime appellant and other accused entered the house and took out Rs. 5,000/- from a pot and appellant Gopal Mandal assaulted his wife twice by means of *Harish* as a result of which his wife died. This witness, further, claims that P.W. Sabitri Devi



was residing with him and the appellant and his associates were apprehended that P.W. 2 might have transferred her lands in his favour and that was the reason, the appellant and others had come in search of P.W. 2 but when they did not find her, they committed the murder of deceased. This witness claims that after the occurrence, he gave a written report to police and the said written report was written by one Murshid Mian and he had put his signature on the aforesaid written report. This witness proved the written report as Ext. 2. This witness admitted in his cross-examination that Murshid Mian is his co-villager and this witness, further, admitted that Murshid Mian prepared the aforesaid written report on the place of occurrence when police came there. This witness, further, admitted that none had signed the aforesaid written report as witness but Murshid Mian had put his signature on the aforesaid written report. This witness admitted that Ext. 2 does not contain signature of Murshid Mian when the Ext. 2 was shown to this witness. This witness, further, admitted that the Public Prosecutor did not show any written report to him which contained signature of Murshid Mian. This witness, further, admitted that the written report, which was signed by him as well as Murshid Mian, was handed over to police. This



witness, further, admitted that the police did not record the statement of Murshid Mian. This witness, further, admitted that P.W. 2 was residing with him since last 20 years and he used to maintain her as well as providing cloths etc.. This witness, further, stated that he went to Police Station alone and gave written report and after that he along with police came to place of occurrence and Daroga seized blood and *Harish* from the place of occurrence. This witness, further, admitted that he had averred in Ext. 2 that at the time of alleged occurrence her aunt was not present at his house but again this witness stated that in the written report, which was given to police, he had never mentioned that his aunt was not present at the house when occurrence took place.

20. P.W. 6 Dr. Sushil Mandal claimed that he examined corpus of deceased Bhama Devi on 15.5.1991 at 4.50 P.M. and found altogether three injuries on her person. P.W. 6 found following injuries:

“(1) There was a lacerated wound on the anterior part of the right ear size 2 ½ “ x ½ “ x deep into bone the right temporal bone was fractured on its lower part. There was considerable amount of blood in intra cranial cavity on the right side. There was also sub-cutaneous haematoma on the right side of the face just anterior to right ear.

(2) There was a lacerated wound on the



upper part of head size 2 ½ “ x ½ “ x scalp deep.

(3) An abrasion on the right side of the cheek size 1 “ x 1/8”.

All the injuries were caused by some hard blunt substances, may be Ish or Harish.

Cause of death was shock and haemorrhage due to ante mortem injuries No. (1) and (2).

Time elapsed since death within 24 hours.”

The P.W. 6 proved the postmortem report of deceased Bhama Devi as Ext. 3.

The death of deceased is not in dispute and Ext. 3 goes to show that injuries were found on head and temple of the deceased and the aforesaid injuries were fatal to the deceased.

21. P.W. 7 Bhola Prasad Mandal was formal witness, who proved the formal first information report.

22. On perusal of entire prosecution evidence, we find that P.W. 5 claimed that he gave written report to police and the aforesaid written report contained his signature as well as signature of Murshid Mian but Ext. 2 goes to show that Ext. 2 does not contain the signature of Murshid Mian. P.W. 5 admitted that he gave written report to police and, therefore, non-examination of Investigating Officer as well as the person to whom written report was given makes the



written report Ext. 2 doubtful. Furthermore, the P.W. 5 has, no where, claimed in his written report that he had seen the alleged occurrence nor he had mentioned in the written report that he was, too, present over the place of occurrence. Furthermore, we find that P.W. 1 claims that the dead body of deceased was lying in her *Bari* whereas P.W. 5 and other so-called eye witness claimed that the occurrence took place in courtyard of house of P.W. 5. Therefore, in the aforesaid circumstances, the presence of P.W. 2, P.W. 3, P.W. 4 and P.W. 5 over the place of occurrence, at the time of alleged occurrence, appears to be doubtful and, moreover, non-examination of the Investigating Officer has also caused serious prejudice to defence as defence could not get an opportunity to bring the improvements made by the prosecution witnesses before the trial court. Therefore, in the aforesaid circumstances, we are of the view that the prosecution could not succeed to prove its case beyond all shadow of reasonable doubts and, we are of the considered view that the appellant is entitled to get benefit of doubt and the impugned judgment of conviction and sentence order cannot sustain in the eye of law.

23. Accordingly, this criminal appeal is allowed



and the impugned judgment of conviction and sentence order are, hereby, set aside. The appellant is acquitted of the charge. The appellant is on bail. He is discharged from the liabilities of bail bonds.

24. Let the copy of the first page and last page of this judgment be handed over to Mr. Sujit Kumar Singh, learned *Amicus Curiae*, so that he could make claim for his remuneration before the appropriate authority.

(Hemant Kumar Srivastava, J)

(Prabhat Kumar Singh, J)

Spd/-

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