

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.41406 of 2018

Arising Out of PS. Case No.-49 Year-1996 Thana- AANDAR District- Siwan

Sunil Kumar Singh Son of Late Ragho Singh, Resident of Village-
Mahamoodpur, P.S.- Ander, District- Siwan.

... .. Petitioner/s

Versus

1. The State of Bihar
2. Munna Sai, Son of Hanif Sai,
3. Lal Biari Mallah,
4. Rai Bilas Mallah, Both sons of Rai Sunder Mallah, All R/o Village-
Mahamoodpur, P.S.- Ander, District- Siwan.

... .. Opposite Party/s

Appearance :

For the Petitioner/s	:	Mr.Ashok Kumar, Advocate
For the Opposite Party/s	:	Mr. Ram Naresh Ray, APP
For opposite parties	:	Mr. Prashant Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA
ORAL ORDER

3 13-12-2019 This application has been filed for quashing of the order dated 12.6.2018 passed by learned Additional Sessions Judge-VI, Siwan in Sessions Trial No. 25 of 1999, arising out of Ander P.S. Case No. 49 of 1996 by which on a petition filed by accused persons (Ext.3), i.e., attested photo copy of post mortem report which was marked as exhibit on 26.2.2018 is cancelled and accordingly allowed the application of the defence.

Prosecution case, in short, is that opposite party Nos. 2 to 4 are made accused in murder case of brother of informant for which Ander P. S. Case No. 49 of 1996 was registered under Sections 307, 326/34 IPC and Section 27 of the Arms Act and



later on Section 302 IPC was added after his death. Police after investigation submitted charge sheet, cognizance was taken and after framing of charge Sessions Trial is going on.

It further appears that during trial attested photo copy of post mortem report of the deceased was marked as Ext.3 on protest but later on petition dated 26.2.2018 has been filed on behalf of defence accused persons stating that for marking the photo copy as exhibit the principle is that if the original post mortem report is not available, carbon copy of the same or the post mortem register be called for from the Sadar Hospital and after post mortem register is made available the same is being marked but in the present case a report has been submitted by Superintendent, Sadar Hospital stating that post mortem register relating to S.T. No. 25 of 1999 has been burnt in an accidental fire on 20.4.2015 but without comparing the same with either carbon copy or the post mortem register, it has been attested and even in spite of objection by defence, attested copy of post mortem report is marked.

It further appears that rejoinder petition has been filed by the prosecution stating that the above petition dated 26.2.2018 filed by accused persons is legally not maintainable and it has been filed only with a view not to examine the Doctor



and linger the matter. The Sadar Hospital has already reported that post mortem register was burnt along with other documents and Sadar Hospital sent attested photo copy of the post mortem report which is genuine and the Doctor who has conducted the post mortem has been examined and attested photo copy of the post mortem report is not a forged document.

It further appears from perusal of the impugned order that Additional P.P. has filed a petition on 27.1.2017 to call for carbon copy of the post mortem report of the deceased and in compliance of the same requisition was sent to the Sadar Hospital, Siwan for post mortem report of the deceased but a report has been sent that above post mortem report was burnt in an accident of fire. Thereafter, Additional P.P. has prayed for requisition to call for post mortem register which has also not been sent as the same has been burnt in an accident of fire. It further appears from the impugned order that attested photo copy of the post mortem report has already been marked as Exhibit-3 on objection.

Learned Additional Sessions Judge has considered the provisions of Section 65 of Indian Evidence Act and also considered the report of Civil Surgeon, Sadar Hospital and cancelled the Exhibit-3, i.e., attested photo copy of post mortem



report, which has already been marked on objection.

The ground for quashing of the order is that in whole Criminal Procedure Code there is no power of a criminal court to review its own order except Section 362 Cr.P.C. which relates to the correction in judgment and that too only the clerical mistake and as such order cancelling Ext.3 is without jurisdiction and that order cannot sustain. Further submission is that above attested photo copy of post mortem report was exhibited during examination of PW 2 Dr. Umashankar Madhup and there is absolutely nothing to show that he has been cross examined on the authenticity of the post mortem report, that amounts to sitting in appeal by the learned Additional Sessions Judge of its own order.

On the other hand, learned counsel for opposite party accused persons has submitted that admittedly Ext.3 is the attested photo copy of the post mortem report and that has been marked only on objection on 26.2.2018 without following the procedure as provided under Section 65 of Indian Evidence Act and considering the same learned Additional Sessions Judge found the Ext.3 as fraudulent document as post mortem register and carbon copy of the same are not available in the Sadar Hospital and that was burnt in an accident of fire, cancelled



Ext.3. Further submission is that on the same day, i.e., on 26.2.2018 when attested photo copy of post mortem report was marked as Ext.3 on objection, a petition has been filed by the accused side and considering the same he has found the same is not admissible and accordingly cancelled Ext.3. Hence this is only an act to rectify the procedural mistake that has been committed by learned trial court, accordingly, there is no merit in the present application.

Learned counsel for opposite parties in order to buttress his contention, relied upon a decision of the Hon'ble Apex Court in the case of **R.V.E. Venkatachala Gounder vs. A.V. & V.P. Temple : AIR 2003 SC 4548**, in paragraph 20 of the said judgment the Hon'ble Apex Court has held as follows :

“20. The learned counsel for the defendant-respondent has relied on the Roman Catholic Mission v. State of Madras and another, AIR 1966 SC 1457 in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes:- (I) an



objection that the document which is sought to be provided is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for providing the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the Court to apply its own mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering



the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case acquiescence would be no bar to raising the objection in superior Court.”

On the basis of the above judgment it has been submitted that that Additional Sessions Judge has only cured the illegality committed by him by admitting attested photo copy of post mortem report as an exhibit. Hence, the present application has no merit.

Heard both sides. It is admitted position that attested photo copy of post mortem report has been marked as Ext.3 on objection while examining the Dr. Umashankar Madhup as PW 2. Thereafter on the same day a petition has been filed by the accused persons against marking of attested photo copy of post mortem report as Ext.3 on the ground that procedure provided under Section 65 of Indian Evidence Act has not been followed and further considering the same learned Additional Sessions



Judge has cancelled Ext.3 which has been marked on objection. This Court failed to understand under what provision once the trial court has admitted Ext.3 as an evidence though on objection, he can order for cancelling the same. It is well settled that any document brought on the record and marked as Exhibit on objection the admissibility of the same can be considered by trial court or the court concerned and that can be considered generally at the time of final argument but in the present case instead of considering admissibility of Ext.3, i.e., attested photo copy of post mortem report, learned Additional Sessions Judge has cancelled Ext.3 which amount to sitting over his earlier order or to review his earlier order marking the same as Ext.3 on objection, which is not permissible as Criminal Procedure Code does not provide such power to review except Section 362 Cr.P.C. which is as follows :

“S. 362. Court not to alter judgment.- Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.”

In the above circumstance, the impugned order dated 12.6.2018 is absolutely without jurisdiction, hence cannot sustain.



Accordingly, this application is allowed and the order dated 12.6.2018 is quashed. However the opposite party accused persons/defence is at liberty to raise the point of admissibility of Ext.3, attested photo copy of post mortem report at the time of final argument and if raised, learned trial court shall consider the same on the basis of materials available on the record.

(Vinod Kumar Sinha, J)

spal/-

U		T	
---	--	---	--

