

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.14 of 1995

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Appeal against the Judgment of Conviction and Sentence order dated 13.12.1994 passed by 9th Additional Sessions Judge, Patna, in Sessions Trial No. 05 of 1990.

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Jai Prakash Pandit, son of Sri Sitaram Pandit, resident of Jalalpur, P.S. Bihta,
District- Patna.

... .. Appellant/s

Versus

The State of Bihar.

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Arun Kumar Tripathi, Amicus Curiae.
For the Respondent/s : Mr. Shivesh Chand Mishra, A.P.P.

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**CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA
and
HONOURABLE MR. JUSTICE RAJENDRA KUMAR
MISHRA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA)**

Date : 23-01-2019

1. This appeal has been preferred against the Judgment of Conviction and sentence order dated 13.12.1994 passed by the learned 9th Additional Sessions Judge, Patna, in Sessions Trial No. 05 of 1990, by which and whereunder, he convicted the appellant for the offence punishable under Section 302 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for life.



2. P.W.6, namely, Sarjun Pandit, gave his Fardbeyan to Officer-in-charge of Danapur Police Station, in presence of local Chawokidar, namely, Chandeshwar Rai (P.W.3) and appellant on 02.09.1989, to this effect that on the same day at about 12.00 noon, he was preparing earthen pot on his roof and in the mean time, his wife Phuljhari Devi came to home and seeing her the appellant ran towards her having dagger in his hand upon which, his daughter Lalti Kumari (P.W.5) started crying. The appellant, thereafter, kept the dagger in the house and picked up *Shisam* log and gave one *Shisam* log blow on the head of Phuljhari Devi, as a result whereof, she fell down there. The appellant again picked up *Khanti* and gave a second blow on the head of Phuljhari Devi, as a result whereof, Phuljhari Devi died then and there. P.W.6, further, claimed that he went running there to save his wife but the appellant started pressing his neck after overthrowing him on the ground. However, in the mean time P.W.3, Chandeshwar Rai, the local *Choukidar*, came there and caught the appellant and the appellant was brought to the police station by the *Chauokidar*. The reason behind the alleged occurrence was domestic dispute.

3. On the basis of Fardbeyan of P.W.6, Sarjun Pandit, Danapur P.S. Case No. 319 of 1989 was registered against the sole



appellant for the offence punishable under Section 304 of the Indian Penal Code.

The matter was investigated by the Investigating Officer and after investigation, Investigating Officer submitted charge sheet against the appellant for the offence punishable under Section 304 of the Indian Penal Code. The cognizance was taken and the case was committed to the court of Session.

The appellant was put on trial but he was charged for the offence punishable under Section 302 of the Indian Penal Code, to which, he denied and claimed to be tried.

4. In course of trial, prosecution examined, altogether, six witnesses and also got exhibited postmortem report as Ext.-1, injury report as Ext.-2, signatures of witnesses as Ext.-3 series. The statement of the appellant was recorded under Section 313 of the Cr.P.C., in which, he reiterated his innocence and stated that the informant and deceased were quarreling with each others and in that course, informant started assaulting the deceased. He, further, stated that he intervened into the aforesaid scuffle but he was, too, assaulted by the informant, as a result whereof, he became unconscious.

5. No evidence was adduced by the appellant in support of his defence but from perusal of his statement recorded



under Section 313 of the Cr.P.C. as well as trends of cross-examination of prosecution witness, it is obvious that the appellant claimed in his defence that it was informant who assaulted the deceased, as a result whereof, the deceased unfortunately died.

6. Learned trial court having evaluated the evidences available on the record and having relied upon testimonies of P.W.5 and P.W.6 convicted and sentenced the appellant passing the impugned Judgment of conviction and sentence order against which, this criminal appeal has been preferred.

7. Learned Amicus Curiae, Shri Arun Kumar Tripathi appearing for the appellant assailed the impugned Judgment of conviction and sentence order, arguing that P.W.6 has admitted in his deposition that at the time of alleged occurrence, he was on roof of his house and, therefore, it is obvious that P.W.6 is not an eye witness of the alleged occurrence. He, further, submitted that so far as P.W.5 is concerned, she was a child, aged about 11-12 years, at the time of alleged occurrence and she admitted in her cross-examination that before recording her statement before the court in course of trial, she was tutored not only by P.W.6 but also by his learned counsel. He, further, submitted that moreover, P.W.5 also admitted that at the time of alleged occurrence, she was at her *Varamdah* and the occurrence took place inside the room and when



she went inside the room, she found the deceased lying in pool of blood and the aforesaid admission of P.W.5 clearly goes to show that she had also not seen the actual killing of the deceased. He, further, submitted that except the aforesaid two prosecution witnesses, none of the prosecution witnesses claimed to have seen the actual killing of the deceased and they have stated that they reached on the place of occurrence after the occurrence. He, further, submitted that P.W.4, who happens to be son of deceased, admitted that when he reached at his home, he learnt that his father and uncle were taken to police station by P.W.3, Chandeshwar *Choukidar*. Learned amicus curiae, further, submitted that it has been admitted by P.W.6 that he was residing separately from the appellant since long and his relation with appellant was strained. He, further, submitted that Ext.2 goes to show that the appellant had also sustained injury and, therefore, all the above stated circumstances, if taken in totality, go to show that there were some fishy in the prosecution case and the learned trial court passed the impugned Judgment of conviction only on the ground of surmises and conjunctures. He submitted that it is well settled principle that if prosecution seeks conviction, it is the duty of the prosecution to prove its case beyond all shadow of reasonable doubts, but in the present case, prosecution could not succeed to prove its case



beyond all shadow of reasonable doubt and, therefore, the impugned Judgment and sentence order cannot be sustained in the eye of law.

8. On the other hand, learned Additional Public Prosecutor appearing for State supported the impugned Judgment of conviction and sentence order arguing that P.W.5 and P.W.6 are eye witnesses of the alleged occurrence and both the above stated prosecution witnesses were present at the place of occurrence when the occurrence took place and moreover, the presence of aforesaid witnesses at the place of occurrence is quite natural, because P.W.5 is daughter whereas P.W.6 is husband of the deceased and, therefore, no doubt can be raised regarding the presence of the aforesaid witnesses on the place of occurrence and the learned trial court rightly relied upon the testimonies of the P.W.5 and P.W.6 and passed the impugned Judgment of conviction and sentence order.

9. Having hearing the contentions of both the parties, we went through the record as well as Lower Court Records.

10. We find that P.W.1, Dr. Jawahar Lal has proved the postmortem report of the deceased and P.W.1 stated that he found two lacerated wounds, i.e., 3½”X1/2”X scale deep on the center of the head and lacerated wound 1”X1/6”X skin deep on just above



the right ear on the person of the deceased. P.W.1 also found that the aforesaid injuries were caused by hard and blunt substance and also found fracture in left parietal and left temporal bone of the deceased. This witness has proved the postmortem report as Ext.1. However, the death of the deceased is not in dispute and it is also not in dispute that she died due to injuries sustained by her on the alleged date of occurrence. The main controversy is as to who assaulted the deceased, because it is appellant's case that it was P.W.6, who assaulted the deceased whereas P.W.6 and P.W.5 claimed that it was appellant who assaulted the deceased. However, it is the duty of prosecution to prove its case beyond all shadow of reasonable doubts and, therefore, now it has to be seen as to whether prosecution has succeeded to discharge the aforesaid duty or not.

11. P.W.2 Tulsi Prasad has been declared hostile, though, he had admitted his signature or seizure list. P.W.3 Chandeshwar Yadav is Chowkidar. This witness stated that on the alleged date of occurrence, he was at his home and heard the noise. He, further, stated that having heard the noise, he went to the house of the appellant where he saw the deceased lying dead on the ground. This witness, further, stated that he took appellant and P.W.6 to police station but he did not inquire from the appellant as



well as informant as to why were they quarreling. This witness, further, stated that after producing the appellant as well as P.W.6 before the police, he returned from there. This witness, further, stated that police along with appellant and P.W.6 came to place of occurrence. He, further, stated that the statement of P.W.6 was not recorded in his presence. This witness, too, declared hostile by the prosecution and when cross-examined by the prosecution, he denied the statement said to have been recorded by the police under Section 161 of the Cr.P.C.

12. P.W.4, Yogendra Pandit is son of deceased. This witness admitted that at the time of alleged occurrence, he had gone to Khagol and when he returned to his home, he found his mother dead and on query, he learnt that it was appellant who committed the murder of deceased. This witness, further, admitted in his cross-examination that the wife of one Shyam Babu had disclosed him that it was appellant who committed the murder of his mother. Admittedly, the wife of Shyam Babu has not been examined.

From perusal of statements of P.W.2, P.W.3 and P.W.4, it is obvious that the aforesaid witnesses are not the eye witness of the alleged occurrence and there is nothing in their testimonies to indicate the guilt of the appellant.



13. The most important witnesses are P.W.5 and P.W.6. P.W.5 was aged about 12 years at the time of her examination. She was examined on 09.04.1990 and according to the prosecution case, the alleged occurrence took place on 02.09.1989, so it is obvious that at the time of alleged occurrence, P.W.5 was aged about 11 years. The learned trial court while recording the deposition of P.W.5 tested her competence and prudence and, after that recorded her statement.

14. P.W.5 supported the prosecution story and claimed herself to be eye witness of the alleged occurrence but when she was cross examined by the defence, she admitted at Paragraph 4 of her cross-examination that she had come to the court earlier twice or thrice along with P.W.6. She also admitted that while she was coming to court along with P.W.6, P.W.6 tutored her as to how to make statement before the court. She also admitted that she was taken to an advocate who also tutored her as to how she has to depose before the court. Furthermore, at paragraph 5 of her cross-examination, she admitted that the alleged occurrence took place in the room of her father and when the alleged occurrence took place, she was sitting at her *Varamdah*. She, further, admitted that she heard the cry of her mother and went inside the room where she found her mother lying on the floor in pull of blood.



15. P.W.6 is the informant as well as the husband of the deceased. This witness also supported the prosecution case but admitted that at the time of alleged occurrence, he was preparing earthen pot on the roof whereas his daughter P.W.5 was sitting at *Varamdah*. This witness, further, claimed that his wife came after cutting grass but appellant ran towards her having dagger in his hand calling her witch, upon which, his wife made protest and went inside her house and started weeping. This witness, further, stated that the appellant kept the dagger in the house and brought a *Shisam* log and gave a blow on the head of the deceased by the aforesaid *Shisam* log, as a result whereof, his wife fell down on the ground and, thereafter, the appellant assaulted her by means of *Khanti*, as a result whereof, his wife died then and there. This witness, further, admitted that his daughter P.W.5 raised alarm, upon which, he got down from the roof and went inside the room where he found his wife lying in pool of blood and the appellant was standing there having *Khanti* in his hand. This witness claimed that he tried to save his wife but he was overthrown by the appellant on the ground and the appellant started pressing his neck. However, in the mean time, P.W.3 came there and saved his life and, thereafter, the appellant was brought to the police station by the *Choukidar*. He also accompanied *Chowkidar* and the appellant.



This witness, further, stated that his statement was recorded by the police at police station. In cross-examination, this witness admitted that he was separate from the appellant at the time of alleged occurrence. He, further, admitted that there were two rooms in his house and in one room he was residing whereas in another room the appellant was residing. This witness, further, admitted at paragraph 10 of his cross-examination that it was not possible to see from the roof as to what was going on in the rooms of his house. This witness, further, admitted that when he came in the room, he found that his wife was lying dead. This witness, further, admitted that P.W.3 came there within three minutes and after that appellant was taken to police station. This witness, further, admitted that, though, he, too, sustained minor injury but he did not get any treatment of the aforesaid injury. At paragraph 15 of the cross-examination, this witness admitted that the appellant did not make any protest while he was being taken to police station by P.W.3 and he went to police station silently.

16. From perusal of statements of P.W.5 and P.W.6, it is obvious that neither P.W.5 nor P.W.6 had seen the actual killing of the deceased and furthermore, we find that no reliance can safely be placed upon the testimony of P.W.5 as she has herself admitted in her deposition that before recording her statement in



court, she was not only tutored by P.W.6 but also by the concerned learned advocate of P.W.6. Therefore, it is difficult to rely upon the statement of P.W.5. So far as P.W.6 is concerned, he has, too, admitted that he had not seen the actual killing of the deceased and moreover, the appellant claimed that it was P.W.6 who had killed his wife and appellant got injury when he went to rescue the deceased. The Ext.2 goes to show that the appellant had sustained injury and no explanation regarding the aforesaid injury has been brought on record by the prosecution. Furthermore, the prosecution failed to bring *Khanti* and *Shesam* log etc. and moreover, the investigating officer has not been examined and therefore, non examination of the Investigating Officer has also caused serious prejudice to the appellant, particularly, in the above stated circumstances, therefore, in our view the impugned Judgment of conviction and sentence order cannot sustain in the eye of law.

17. On the basis of the aforesaid discussions, the instant criminal appeal is allowed and the impugned Judgment of conviction and sentence order dated 13.12.1994 passed in Sessions Trial No. 05 of 1990 are, hereby, set aside. The appellant is acquitted of the charge. The appellant is on bail, therefore, he is discharged from liabilities of his bail bonds.



18. Let a copy of first and last page of this Judgment be handed over to Arun Kumar Tripathi, the learned Amicus Curiae, so that he could make claim for his remuneration before the competent authority.

(Hemant Kumar Srivastava, J)

(Rajendra Kumar Mishra, J)

Bhardwaj/-
Rahul/-

AFR/NAFR	
CAV DATE	
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