

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.302 of 1995

1. SHEIKH TEJAM &
2. Sheikh Nejam, Both sons of Late Sk. Imaman, resident of village-Sultanpur, Police Station-Amarpur, District-Banka.

... .. Appellants

Versus

The STATE of Bihar

... .. Respondent/s

Appearance :

For the Appellants	:	Mr. Amrit Anunay (Amicus Curiae)
For the Respondent	:	Mr. Shivesh Chandra Mishra, APP

CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA

and

HONOURABLE MR. JUSTICE PRABHAT KUMAR SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA)

01-07-2019

This Criminal Appeal has been preferred against the judgment of conviction and sentence order dated 04.09.1995 passed by learned Ist Additional Sessions Judge, Banka in Sessions Trial No.199 of 1993 by which and whereunder he convicted the appellant no.2, namely, Sheikh Nejam for the offence punishable under Section 302 of the Indian Penal Code and Section 27 of the Arms Act and furthermore convicted the appellant no.1 Sheikh Tejam for the offence punishable under Sections 302/114 of the Indian Penal Code and, accordingly, both the above stated appellants were sentenced to undergo imprisonment for life for their above stated offences. No separate sentence was given to appellant no.2 Sheikh Nejam for



the offence punishable under Section 27 of the Arms Act.

2. Briefly stated the prosecution case is that on 29.05.1992 at about 9.30 P.M. at Amarpur Referral Hospital, deceased Md. Raju in injured condition gave his fardbeyan to Sub Inspector of Amarpur police station to this effect that on the same day at about 8.10 P.M. while he was returning to his home from the tea shop of one Mokim after taking tea and reached near the house of appellant no.2, namely, Sheikh Nejam, he saw that appellants were standing there. He further stated in his fardbeyan that both the above stated persons started abusing him and when he asked the reason of abuse, appellant no.1 Sheikh Tejam ordered to shoot him. Thereafter, appellant no.2 Sheikh Nejam took out country made pistol from his waist and with intention to commit murder opened fire on him as a result whereof he sustained fire arm injury on the front of his left shoulder and having sustained fire arm injury, he fell down there. The appellants fled away from there. He further claimed in his fardbeyan that his brother Sk. Azad (PW-1), Shyam Sunder Das (PW-5), Sk. Samsuddin (not examined), Sk. Gani (PW-2) and several other persons witnessed the occurrence. He, further, claimed that after the occurrence, he was taken to Amarpur Referral Hospital for treatment.



3. On the basis of above stated fardbeyan of deceased Md. Raju, Amarpur P.S. Case No.147 of 1992 for the offences punishable under Sections 307/34 of the Indian Penal Code and Section 27 of the Arms Act was registered on the same day, i.e., on 29.05.1992 and on the same day at about 10.30 P.M. formal FIR was drawn up for the above stated offences against the appellants. However, the formal FIR was dispatched to the Court through Special Messenger but the date of dispatch was not given in formal FIR. The formal FIR was put up before the learned Chief Judicial Magistrate, Banka on 02.06.1992. It is pertinent to note here that there appears to be over writing on the date of receipt of formal FIR in the Court of learned Chief Judicial Magistrate, Banka. The perusal of original FIR goes to show that earlier, below the initial signature of learned Chief Judicial Magistrate, Banka, the date was given as 01.06.1992 but, subsequently, after making overwriting it was made as 01.06.1992. However, the lower court record reveals that the formal FIR was put up before learned Chief Judicial Magistrate, Banka on 11.06.1992.

4. Harendra Kumar Singh (PW-8) took charge of investigation. During course of the investigation, the informant Md. Raju died and, thereafter, Section 302 of the Indian Penal



Code was added in the formal F.I.R. vide order dated 11.06.1992.

5. PW-8 inspected the place of occurrence, recorded the statements of witnesses but before completion of investigation, he handed over charge of investigation to the then Officer-in-Charge of Amarpur Police Station on 13.07.1992. The chargesheet against the appellants was submitted for the offences punishable under Section 302 and other minor Sections of the Indian Penal Code and Section 27 of the Arms Act. The cognizance of the offence was taken and the case was committed to the Court of Sessions in usual way and, accordingly, both the appellants were put on trial before the learned trial Court in Sessions Trial No.199 of 1993.

6. The appellants jointly stood charged for the offences punishable under Sections 302 and 504 of the Indian Penal Code whereas appellant no.2, namely, Sheikh Nejam separately charged for the offences punishable under Section 27 of the Arms Act and similarly, appellant no.1 Sheikh Tejam stood, separately, charged for the offence punishable under Section 302 read with Section 114 of the Indian Penal Code. The charges were read over and explained to the appellants to which they denied and claimed to be tried.



7. In course of trial, prosecution examined, altogether, eight prosecution witnesses and also got exhibited injury report as Ext-1, postmortem report as Ext-2, formal FIR as Ext-3 and fardbeyan as Ext-4. The statements of appellants were recorded under Section 313 of the Cr.P.C. in which they reiterated their innocence and claimed their false implication. No evidence was adduced by the appellants in support of their defence but from perusal of statements recorded under Section 313 of the Cr.P.C. as well as the trends of cross-examinations of prosecution witnesses, it appears that defence of the appellants' was denial of the prosecution story.

8. Learned trial Court having analyzed the prosecution evidence, convicted and sentenced the appellants in the manner as stated above having relied upon testimonies of PW-1, PW-2, PW-4, PW-5, PW-6, PW-7 and PW-8.

9. Sri Amrit Anunay, learned Amicus Curiae appearing for the appellants, assailed the impugned judgment of conviction and order of sentence arguing that the learned trial Court failed to take note of this fact that the formal FIR and fardbeyan were put up before the learned Chief Judicial Magistrate, Banka after a long delay and no explanation regarding the aforesaid delay was given by the prosecution. He



submitted that so called fardbeyan of deceased Md. Raju was recorded by the then Officer-in-Charge of Amarpur police station, namely, Bhola Nath Singh but the aforesaid Bhola Nath Singh, the then Officer-in-Charge of Amarpur police station, was not examined by the prosecution. He further submitted that according to prosecution case, the fardbeyan of deceased Md. Raju was recorded at Referral Hospital, Amarpur on 29.05.1992 at 9.30 P.M. and PW-6 Dr. Sarba Narain Kanth claimed to that he had examined the deceased Md. Raju on 29.05.1992 at 8.15 P.M. Therefore, the aforesaid fact goes to show that just after the occurrence, the deceased was taken to referral hospital where his fardbeyan was recorded but it is surprising enough that before recording the fardbeyan of deceased Md. Raju, the then Officer-in-Charge of Amarpur police station did not take pain to obtain certificate from PW-6 as to whether deceased Md. Raju was in a position to make his statements or not. Learned Amicus Curiae, further, submitted that the testimonies of PWs.6 and 7 go to show that deceased Md. Raju had sustained injury on his chest and the injury of deceased Md. Raju was of serious nature and, therefore, it is obvious that deceased Md. Raju was not in a position to make such long statement before the police and so-called fardbeyan of deceased Md. Raju is not free from



doubt. Learned Amicus Curiae further, submits that no doubt, some prosecution witnesses claimed themselves to be eye witnesses of the alleged occurrence but the impugned judgment goes to show that at the time of passing impugned judgment, the so called dying declaration of deceased Md. Raju had prejudiced the mind of the learned trial Court. Learned Amicus Curiae referred the decision of **Paramjit Singh and Ors v. State of Punjab and Ors reported in (1997) 4 SCC Supreme Court cases (Cri) 156** wherein, it has been held by Apex Court that if maker of dying declaration despite of having serious injury makes minute and detailed statement, the aforesaid statement should not be treated as free from doubt.

10. Learned Amicus Curia, next, submitted that all the so called eye witnesses are related with each others and as a matter of fact, they are interested witnesses. He, further, submitted that no independent witness came forward to support the prosecution case even in the circumstance when there were several houses near the place of occurrence.

11. He, next, submitted that PW-8 admitted in his cross-examination that he did not find any blood or any other sign of violence on the place of occurrence. He, further, submitted that almost all the prosecution witness admitted that



the alleged occurrence took place in the night and at the time of alleged occurrence, there was complete dark but none of the prosecution witnesses disclosed the source of light in which they had seen the alleged occurrence and, therefore, in the aforesaid circumstance as well as taking totality of the materials available on the record, the impugned judgment of conviction and order of sentence cannot sustain in the eye of law.

12. On contrary learned Additional Public Prosecutor supported the impugned judgment and argued that PW-1 Sk. Azad, PW-2 Sk. Gani, PW-4 Sk. Jamil and PW-5 Shyam Sunder Das are eye witnesses and they have, categorically, stated that appellant no.2 Sheikh Nejam shot fire on the deceased Md. Raju. He submitted that there is nothing in the depositions of above stated witnesses to disbelieve their statements. He, further, submitted that no doubt, almost all the eye witnesses are related to each others except PW-5 but it is settled principle of law that testimony of interested witness cannot be discarded only on the ground of being interested witness rather the testimony of interested witness has to be scrutinized with care and caution. He submitted that after carefully scrutinizing the statements of above stated prosecution witnesses, it can easily be said that there is nothing in the



statements of aforesaid witnesses on the basis of which their statements could be disbelieved. He further submitted that PW-6, specifically, stated that just after the alleged occurrence, he examined the deceased and found fire arm injuries on his chest and similarly PW-7 also found fire arm injuries on the chest of the deceased and, therefore, the statements of PWs.6 and 7 also corroborate the claim of PWs.1, 2, 4 and 5. He further submitted that the investigating officer has proved the place of occurrence and moreover, none examination of Bhola Singh, the then Officer-in-Charge of Amarpur police station does not make any difference because the defence could not succeed to prove that none examination of the aforesaid police official has caused prejudice to the defence. He submitted that as a matter of fact, the prosecution has proved its case beyond all shadow of reasonable doubts and there is no ground to interfere in the impugned judgment of conviction and order of sentence.

13. Having heard the rival contentions of the parties, we went through the records and find that PWs.1, 2, 4 and 5 claimed themselves to be eye witnesses of the alleged occurrence and all the aforesaid witnesses stated in respect of the manner in which the alleged occurrence took place. Furthermore, all the aforesaid witnesses admitted that the



alleged occurrence took place at about 8 P.M. on 29.05.1992. The statements of aforesaid witnesses go to show that at the time of alleged occurrence, the sun had already set down and there was dark. However, the aforesaid witnesses have nowhere stated the source of light in which they identified the appellants.

14. PW-1 is full brother of deceased Md. Raju and PW-2 Sk. Gani admits in his cross-examination that PW-1 is his own brother-in-law. Therefore, it is obvious that PWs.1 and 2 are related with the deceased. So far as PW-5 Shyam Sunder Das is concerned, he appears to be a chance witness and stated that he was returning after taking tea and reached near the house of appellant no.2 Sheikh Nejam and witnessed the alleged occurrence. PW-2 claims at para-5 of his cross-examination that the alleged occurrence took place near the betal shop of appellant no.2 Sheikh Nejam.

15. PW-8 Harendra Kumar Singh admitted that fardbeyan of deceased Md. Raju was recorded by Bhola Nath Singh, the then Officer-in-Charge of Amarpur Police Station. This witness proved the fardbeyan as Ext-4. This witness also admitted that Ext-4 was recorded on 29.05.1992 and on the same day at about 10.30 P.M., he took charge of investigation and he visited the place of occurrence on 30.05.1992. However,



this witness admitted that he again visited the place of occurrence on 01.06.1992 and got information about the death of deceased. It is pertinent to note here that the learned trial Court treated the fardbeyan of deceased as his dying declaration because in course of investigation, it came to light that deceased Md. Raju died on next day of the alleged occurrence in course of his treatment. Therefore, it is obvious that after one day of the alleged occurrence, the deceased Md. Raju died and the aforesaid fact came to the notice of PW-8 on 01.06.1992 but from perusal of lower court record, it would appear that the first information report was sent to learned Chief Judicial Magistrate, Banka on 11.06.1992 and on the same day, the Officer-in-Charge of Amarpur police station gave information in respect of death of deceased Md. Raju and prayed for addition of Section 302 of the Indian Penal Code in the formal FIR.

16. As we have already noted that the first information report was dispatched to the court through special messenger but the date of dispatch of the first information report to the concerned court was not given in column no.3 of the formal FIR. Furthermore, the formal FIR goes to show that the same was put up before learned Chief Judicial Magistrate, Banka on 01.06.1992 but after making cutting on the aforesaid



date, it was written as 02.06.1992. However, as we have already stated that the order-sheet dated 11.06.1992 of lower court goes to show that FIR was put up in Court on 11.06.1992. Admittedly, Bhola Nath Singh, the concerned police official, who had recorded fardbeyan of deceased Md. Raju, was not examined by the prosecution and the defence could not get opportunity to cross-examine the above stated Bhola Nath Singh on the above stated ambiguities. No doubt, delay in sending the FIR to Court is not always fatal to the prosecution case but in the present case, there is vital contradiction between order-sheet of lower court as well as the date written on the formal FIR. Moreover, even if it is assumed that the formal FIR was put up before learned Chief Judicial Magistrate, Banka on 02.06.1992, then also prosecution failed to explain the circumstances in which the above stated FIR and fardbeyan could not reach before the concerned Magistrate within 24 hours from its registration. Therefore, the above stated delay creates doubt about the genuineness of fardbeyan. Moreover, it is an admitted case of prosecution that the deceased had sustained fire arm injury and he was examined by PW-6 at Referral Hospital, Amarpur and furthermore, it is also admitted case of the prosecution that fardbeyan of deceased Md. Raju was recorded



at Referral Hospital, Amarpur but the police official who recorded the fardbeyan of Md. Raju did not take any certificate from PW-6 as to whether deceased was in a position to speak or not. Although, it is not essential that before recording fardbeyan of an injured, there must be a certificate of doctor to show that the statement maker was capable of giving his statements but in the present case, as we have noticed that according to prosecution case, the fardbeyan of deceased Md. Raju was recorded in the hospital and PW-6 was available in the hospital at the time of recording fardbeyan of deceased Md. Raju but even then the police officials, who recorded the fardbeyan of deceased Md. Raju, did not take pain to take certificate from PW-6 as to whether deceased Md. Raju was in position to give his statement or not. Furthermore, the fardbeyan of deceased Md. Raju was put up before learned Chief Judicial Magistrate, Banka after long delay and, therefore, all the above stated circumstances create doubt about the fardbeyan of the deceased Md. Raju and no reliance can safely be placed on the above stated fardbeyan. Furthermore, it is an admitted position that the alleged occurrence took place at about 8 P.M. when there was complete dark and not a single prosecution witness disclosed the source of light in which he had identified. Therefore, aforesaid



circumstance also creates doubt about the claim of so-called eye witnesses.

17. On the basis of aforesaid discussion, we are of the view that the appellants are entitled to get benefit of doubts because prosecution could not succeed to prove its case beyond all shadow of reasonable doubts. Accordingly, this criminal appeal is allowed and the impugned judgment of conviction and sentence order are, hereby, set aside. The appellants are acquitted of charges. They are on bail and, accordingly, they are discharged from the liabilities of their respective bail bonds.

18. Copy of the first and last pages of the judgment be handed over to Sri Amrit Anunay, Advocate so that he may claim for his remuneration before the competent authority.

(Hemant Kumar Srivastava, J)

(Prabhat Kumar Singh, J)

Brajesh Kr./-

AFR/NAFR	NAFR
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