

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.427 of 2018

Arising Out of PS. Case No.-818 Year-2014 Thana- KATIHAR District- Katihar

.....

{Against the Judgment of acquittal dated 19.01.2018 passed by the learned
Additional Sessions Judge-III, Katihar, in Sessions Trial No.121 of 2015}.

=====

Niranjan Prasad Das, son of Late Thakur Prasad Das, resident of village-
Kursail, Police Station-Kadwa, District-Katihar.

... .. Informant/Appellant.

Versus

1. The State of Bihar.
2. Arjun Mandal, son of Late Shivcharan Mandal, resident of village-
Shankarpur, Ram Para Police Station, Katihar, District-Katihar.

... .. Respondents.

=====

Appearance :

For the Appellant	:	Mr. Jibendra Mishra, Advocate. Mr. Dharendra Kumar Jha, Advocate.
For the State	:	Mr. Dilip Kumar Sinha, A.P.P.
For the Respondent No.2:		Mr. Ajay Kumar Thakur, Advocate. Mr. Md. Imteyaz Ahmad, Advocate. Mr. Nilesh Kumar, Advocate. Mr. Pravin Kumar, Advocate. Ms. Swati Sinha, Advocate.

=====

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

Date : 21-01-2019

Heard learned counsel appearing for the appellant, learned
counsel appearing for the respondent no.2 as well as the learned
A.P.P. for the State on the point of admission as well as on I.A.
No.1688 of 2018, which has been filed on behalf of the appellant
under Section 378(3) of the Code of Criminal Procedure, seeking
leave to pursue this criminal appeal.



2. The informant (appellant) is the father of the deceased and has come under the purview of the victim and, therefore, he does have right to challenge the Judgment of acquittal.

Accordingly, I.A. No.1688 of 2018 stands allowed and the appellant is permitted to pursue this criminal appeal.

3. This criminal appeal has been preferred against the Judgment of acquittal dated 19.01.2018 passed in Sessions Trial No.121 of 2015, by which and whereunder the learned Additional Sessions Judge-III, Katihar, acquitted the respondent no.2 of the charge framed under Section 302 of the Indian Penal Code.

4. The perusal of the record goes to show that Katihar Town P.S. Case No.818 of 2014 was registered against the respondent no.2 for the offence punishable under Section 302 of the Indian Penal Code on 25.12.2014 on the basis of the fardbeyan of the appellant, who claimed in his fardbeyan that on 25.12.2014 at about 10.00 A.M., he got telephonic message that his daughter, namely, Kanchan Devi, aged about 30 years, was killed by the respondent no.2, who happens to be her husband, and having got the aforesaid information, he went to the house of his daughter, where the son of his daughter disclosed that the respondent no.2 assaulted the deceased by means of 'Dabia'. The deceased was taken to the hospital but while she was on her way, she died.

5. The police after investigation submitted charge-sheet under Section 302 of the Indian Penal Code against the respondent



no.2 and, accordingly, the respondent no.2 was put on trial before the learned trial court and stood charged for the offence punishable under Section 302 of the Indian Penal Code.

6. In course of trial, prosecution examined, altogether, three witnesses, i.e., P.W.1 Suchak Kumar Rana, P.W.2 Ashlam Sher Ansari (Investigating Officer) and P.W.3 Dr. Sant Prasad Saha, though, altogether, seven prosecution witnesses had been shown in the charge-sheet.

7. Learned trial court after considering the evidences of the aforesaid prosecution witnesses passed the Judgment of acquittal.

8. Learned counsel appearing for the appellant submits that the fardbeyan of the appellant goes to show that one Anis Kumar, aged about 8 years, who happens to be the son of the respondent no.2 and the deceased, claimed to have seen the alleged occurrence and narrated the entire story to the appellant but it is surprising enough that the aforesaid Anis Kumar was not examined by the Investigating Officer, nor his name was figured in the charge-sheet in the category of the prosecution witness. He further submits that the learned Public Prosecutor not only failed to produce the aforesaid witness but also failed to make the prayer before the learned trial court for summoning the aforesaid witness. He further submits that, similarly, the learned trial court also failed to summon the aforesaid witness under Section 311 of the Code of Criminal Procedure, particularly, in the circumstance, when the aforesaid



prosecution witness was an essential witness for just and proper decision of the case. He further submits that no notice or summon was ever served upon the informant, as a result whereof, the informant also could not appear before the learned trial court to depose in the case.

9. On the other hand, learned counsel appearing for the respondent no.2 as well as the learned Additional Public Prosecutor supported the impugned Judgment of acquittal, arguing that the cousin brother of the informant was examined before the learned trial court as Prosecution Witness No.1 but the aforesaid witness has, nowhere, stated that the son of the deceased had disclosed the manner of occurrence to informant (appellant), prior to the institution of the F.I.R. He further submits that the informant (appellant) was fully aware about the progress of the trial of the respondent no.2 but he willfully did not appear before the trial court with an object to keep the respondent no.2 behind the bars and when the learned trial court closed the prosecution case and passed the Judgment of acquittal in favour of the respondent no.2, the informant (appellant) has preferred this criminal appeal against the Judgment of acquittal with a view to fill up the lacuna of the prosecution case, which is not permissible in the eye of law. He further submits that by filing this criminal appeal, the appellant wants to get an order of re-trial, so that the trial of the respondent no.2 could again prolong for indefinite period. He further submits that the appellant was fully aware about



the progress of the investigation of the case as well as the submission of the charge-sheet but he never raised objection against the Investigation of the case nor filed any petition to this effect that the son of the deceased had not been examined by the Investigating Officer. He further submits that, as a matter of fact, the son of the deceased is residing with the appellant and by tutoring the son of the deceased, the informant wants to bring a fresh material on the record, which shall cause serious prejudice to the respondent no.2. He further submits that so far as the non-examination of the appellant is concerned, the learned trial court issued non-bailable warrant of arrest twice against the informant (appellant) but in spite of issuance of non-bailable warrant of arrest, he did not appear before the learned trial court and the aforesaid fact clearly goes to show that the learned trial court took proper steps to procure the attendance of the informant (appellant) but all the steps taken by the learned trial court went in vain and, now, the informant (appellant) cannot say that no opportunity was given to him to depose in the case.

10. Having heard the rival contentions of both the parties, we went through the records along with lower court's record.

11. The fardbeyan of the informant (appellant) goes to show that the informant claimed in his farebeyan that the son of the deceased disclosed the manner of the occurrence, but, admittedly, the son of the deceased was not shown as prosecution witness in the charge-sheet. Furthermore, it is obvious that the son of the deceased



was not examined by the Investigating Officer in course of investigation. The impugned Judgment goes to show that the Investigating Officer found that the place of the occurrence of the case was the kitchen of the deceased and, therefore, it is apparent that the alleged occurrence took place inside the house of the respondent no.2. Furthermore, the weapon, which is said to have been used in committing the alleged occurrence, claimed to have been seized by the Investigating Officer. Therefore, in the aforesaid circumstance, in our view, the son of the deceased was essential witness and he ought to have been examined, not only by the Investigating Officer but also by the court, exercising the power given under Section 311 of the Code of Criminal Procedure but, not only the Investigating Officer but court also, failed to get the aforesaid witness examined.

12. No doubt, warrant of arrest is said to have been issued twice against the appellant to procure his attendance but there is noting on the record to show that the aforesaid warrant of arrest was ever executed and, therefore, only on the basis of the issuance of warrant of arrest as well as examination of the cousin brother of the appellant, it cannot be said that the appellant was fully aware about the progress of the trial as well as he willfully avoided to appear before the trial court to depose in the case.

13. So far as the argument advanced on behalf of the respondent no.2 that the prosecution wants to fill up the lacuna of the prosecution case is concerned, we are humbly not in agreement with



the aforesaid argument advanced by the learned counsel of the respondent no.2 because it is an admitted position that the fardbeyan of informant contains that son of deceased claimed to have seen the occurrence but the name of the aforesaid witness has not been shown in the charge-sheet and, therefore, the non-mentioning of the name of the aforesaid witness in the charge-sheet prima facie shows that he was not examined by the Investigating Officer in course of investigation. Similarly, the learned trial court also did not take any step to examine the aforesaid witness by exercising power vested in court under Section 311 of the Code of Criminal Procedure and, therefore, in our view, the examination of the aforesaid witness is essential for just and proper decision of the case and when the examination of a witness becomes essential for just and proper decision of the case and if the court takes step to examine the aforesaid witness, it cannot be said that the step of the court amounts to fill up the lacuna of the prosecution case. Therefore, in the aforesaid circumstance, we are of the view that this matter should be sent to the learned trial court for re-trial, giving opportunity to the informant (appellant) to produce the son of the deceased as well as himself for examination in trial as prosecution witness within three months from the date of receipt/production of a copy of this Judgment to the learned trial court.

14. In view of the aforesaid discussions, this criminal appeal is allowed. Accordingly, the impugned Judgment of acquittal



dated 19.01.2018 passed by the learned Additional Sessions Judge-III, Katihar, in Sessions Trial No.121 of 2015 is, hereby, set aside and the matter is remitted to the learned trial court for re-trial with direction to the learned trial court to give three months more time to the prosecution from the date of receipt/production of a copy of this Judgment, so that the informant as well as the son of the deceased could be examined and the learned trial court after examination of the aforesaid witnesses shall proceed, giving opportunity to the defence to cross-examine the above stated witnesses as well as other witnesses, if needed, in accordance with law and, after that, shall pronounce a fresh Judgment in accordance with law.

15. The Office must return the Lower Court Records to the court concerned without any delay.

(Hemant Kumar Srivastava, J)

(Rajendra Kumar Mishra, J)

Pradeep Srivastava/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	28.01.2019.
Transmission Date	28.01.2019.

