

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.970 of 2013

Arising Out of PS. Case No.-402 Year-2009 Thana- KARAI PARSURAI District- Nalanda

Sanjay Paswan, son of late Arjun Paswan, resident of village - Sandh, P.S.-
Karai Parsurai, District- Nalanda.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Sri Ajay Kumar Thakur, Advocate Ms. Swati Sinha, Advocate Mrs. Kumari Sujata Sinha, Advocate
For the Respondent/s	:	Sri Ajay Mishra (A.P.P.)

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR
and
HONOURABLE MR. JUSTICE ANIL KUMAR SINHA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 22-04-2019

1. The sole appellant has preferred the present appeal under Section 374(2) of the Code Of Criminal Procedure, 1973 [hereinafter referred to as the “Cr.P.C.”] after being convicted and sentenced under Section 302 of the Indian Penal Code, 1860 [hereinafter referred to as the “I.P.C.”] and Section 27 of the Arms Act, 1959 [hereinafter referred to as the “Arms Act”] in Sessions Trial No. 670 of 2010.

2. The appellant by judgment dated 18/07/2013 was convicted for the offence under Section 302 of the I.P.C. and



Section 27 of the Arms Act and by order dated 19.07.2013 under Section 302 of the I.P.C. he was sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/-. In case of default in payment of fine he was directed to further undergo rigorous imprisonment for two months. Under Section 27 of the Arms Act he was sentenced to undergo rigorous imprisonment for four years. Both the sentences were directed to run concurrently. The appellant has been convicted and sentenced in Sessions Trial No. 670 of 2010 [arising out of Hilsa (Karai Parsurai) P.S. Case No. 402 of 2009] by the learned 1st Additional Sessions Judge, Hilsa, Nalanda [hereinafter referred to as the “trial judge”]

3. Short fact of this case is that on 28.10.2009 at 9.00 P.M. Sub Inspector of Police -cum-S.H.O. of Karai Parsurai Police Station namely: Sri Krishna Prasad (P.W. 15) recorded *fardbyan* of Shailesh Kumar (P.W. 6) of village - Sandh, P.S. - Karai Parsurai. **The fardbyan was recorded in Karai Police Station itself.** In the *fardbyan* the informant (P.W. 6) disclosed that on the same day i.e. on 28.10.2009 in the evening at 5.00 P.M. his uncle Lallu Gope (deceased) of village - Karai Parsurai had gone along with the OX of his nephew to the



house of his co-villager: Bal Krishna Modi. While he reached near his house in the lane, (1) Sanjay Paswan carrying pistol in his hand, (2) Satyendra Paswan carrying rifle in his hand, (3) Gorakh Paswan carrying pistol in his hand, (4) Rajesh Mochi carrying rifle in his hand, and (5) Sudhir Paswan carrying pistol in his hand arrived there and all started abusing Lallu Gope. Lallu Gope asked not to abuse. Thereafter Satyendra Paswan ordered by using filthy language to kill him whereupon his uncle- Lallu Gope started fleeing away. In the meanwhile Sanjay Paswan (appellant) gave one shot of firing from his pistol on his back side. His uncle was seriously injured and fell down and started squirming and said that Sanjay Paswan had shot him. On hearing the sound of abuses and firing neighbours namely: Ajay Kumar (P.W. 3), Nageshwar Prasad (P.W. 13), Jatan Prasad (P.W. 5) and other number of persons arrived there whereas the miscreants raising slogan माले जिन्दाबाद and by firing fled away from the Western side. This witness stated that at the time of occurrence he was near the shop of Bal Krishna Modi since he had gone to purchase something and claimed to be eye witness to the occurrence. After his uncle -Lallu Gope was seriously



injured he along with others put him on tempo and carried him for his treatment to P.M.C.H. but while they were moving towards P.M.C.H. on way near Fatuha the injured- Lallu Gope succumbed to his injuries. Thereafter the informant brought dead body of his uncle and came to Karai Pasurari Police Station where his *fardbyan* was recorded. The reason for the occurrence was explained as old animosity. He further disclosed that on the wearing of his deceased uncle one damaged projectile was found which was lacerated with blood and same was produced by him. The informant claimed that (1) Sanjay Paswan (appellant), (2) Satyendra Paswan, (3) Gorakh Paswan, (4) Rajesh Mochi, (5) Sudhir Paswan forming unlawful assembly with deadly weapons had killed his uncle- Lallu Gope by giving shot of firing. The said *fardbyan* was read over to him and after finding it correct in presence of his villager -Mithilesh Prasad (P.W. 11) he put his signature in the bottom of the *fardbyan*. As a witness to the *fardbyan* Mithilesh Prasad (P.W. 11) also put his signature. The said *fardbyan* was forwarded by Krishna Prasad (P.W. 15) to S.H.O. Hilsa Police Station for instituting a case. On the basis of the said *fardbyan* on 29.10.2009 at 9.00 A.M. a



formal F.I.R. vide Hilsa (Karai Parsurai) P.S. Case No. 402 of 2009 was drawn up for the offence under Section 147, 148, 149, 326, 302 of the I.P.C. and Section 27 of the Arms Act against the aforesaid five accused persons. After registering F.I.R. the case was investigated and on 06.03.2010 charge sheet was submitted against the appellant keeping investigation pending against others. On 17.03.2010 learned Additional Chief Judicial Magistrate, Hilsa took cognizance of the offence and the case was committed to the court of Sessions on 03.07.2010 and as such it was numbered as Sessions Trial No. 670 of 2010. On 13.12.2010 charge under Section 302 of the I.P.C. and Section 27 of the Arms Act was framed against the sole appellant.

4. During the trial to establish its case on behalf of the prosecution altogether sixteen witnesses were examined. Out of sixteen witnesses, P.W. 1- Upendra Prasad (brother of the deceased), P.W. 2 -Harendra Prasad (son of the deceased), P.W. 5- Jatan Prasad @ Jatan Yadav (another brother of the deceased) and informant- Shailesh Kumar (P.W. 6) were examined as eye witness to the occurrence. P.W. 3 -Ajay Kumar is the seizure list witness, whereas P.W. 4 -Sanjeet



Kumar (grand son of the deceased) besides being witness to the seizure list has come out with a case of oral dying declaration of the deceased. P.W. 7 -Rajesh Paswan and P.W. 13- Nageshwar Prasad are independent and hearsay witnesses. P.W. 11 - Mithilesh Prasad is the maternal uncle and P.W. 14 -Ranjeet Gope (cousin brother of the deceased) are hearsay witnesses. P.W. 15- Krishna Prasad at the relevant time was S.H.O., Karai Parsurai Police Station and Investigating Officer of the case and P.W. 16 -Dr. Shrikant Prasad had conducted post mortem examination on the dead body of the deceased, whereas P.W. 8 - Bindi Paswan, P.W. 9- Samu Paswan, P.W. 10 -Devranjan @ Premranjan and P.W. 12- Mahendra Paswan since did not support the prosecution case were declared hostile.

5. Besides oral evidence on behalf of the prosecution documentary evidences were also brought on record. Signature on the seizure list in respect of damaged projectile of P.W. 4 (Sanjeet Kumar) was marked as Ext. 2 and his signature on the seizure list relating to woolen shawl and blood soaked soil was marked as Ext. 5/1. Signature on *fardbyan* of informant -P.W. 6 was marked as Ext. 2, signature



of Mithilesh Prasad (P.W. 11) on the *fardbyan* was marked as Ext. 2/1 and signature of P.W. 6 on the seizure list relating to seizure of damaged projectile was marked as Ext. 3. Signature on the *fardbyan* of P.W. 11 marked as Ext. 4 and he also proved signature of Sanjeet Kumar (P.W. 4) on seizure list which was marked as Ext. 5/1. Fardbyan of the case was got marked as Ext. 5/2 by P.W. 15 -Krishnad Prasad (Investigating Officer). He also proved inquest report as Ext. 6, production -cum- seizure list in respect of damaged projectile (Ext. 7), seizure list of blood soaked soil and woolen shawl (Ext. 8) and post mortem examination report proved by P.W. 16 - Dr. Shrikant Prasad marked as Ext. 9.

6. After completion of prosecution evidence the appellant was questioned with incriminating circumstances and evidences brought against him during the trial which he denied and claimed to be innocent and his statement under Section 313 of the Cr.P.C. was recorded on 07.01.2013. However, from defence said no evidence either oral or documentary has been brought on record.

7. Sri Ajay Thakur, learned counsel assisted by Ms. Shwati Sinha, learned counsel for the appellant after placing



entire evidence has argued that prosecution has not been able to establish its case beyond all reasonable doubts against the appellant. He submits that though informant has come out with a case as if he was eye witness to the occurrence but fact remains that he was not witness to the occurrence and subsequently a story was developed and he has come out with a case as if he had seen the occurrence. He further submits that prosecution suppressed the initial version and as such on the basis of subsequent version the learned trial judge was not required to pass judgment of conviction and sentence. To elaborate his argument regarding suppression of earlier version he has taken the court firstly to the evidence of Investigating Officer (P.W. 15) and submits that the Investigating Officer in his evidence has stated that he along with Force was out of Police Station in connection with a search. He got an information that in the village- Sandh one person had received fire arm injury. Thereafter in the evening at 5.15 P.M. he reached the village- Sandh where he got information that Lallu Gope, Son of Rambriksh Gope had received gun shot injury and he was carried to P.M.C.H. This witness further stated that at the same time he got information



that injured while was being carried to P.M.C.H. on way near Fatuha died and his dead body was being brought to the Police Station. Sri Thakur submits that though P.W. 15 then from the place of occurrence rushed to the Police Station, in Police Station at 9.00 P.M. he recorded *fardbyan* of P.W. 6. Sri Thakur has argued that had anyone seen the appellant in committing the offence along with others, there was no reason not to inform the Police Officer who had arrived immediately after the occurrence i.e. at 5.15 P.M. at the place of occurrence. He submits that in case of such type of occurrence in a village entire news spreads as fire and it was expected that the Police Officer would have got information regarding the occurrence as well as culprits. He submits that it appears that initial version was otherwise and subsequently with consultation a case was made out, due to animosity, to implicate the appellant and his other caste men. He further submits that almost all the witnesses who have claimed to be eye witness i.e. P.W. 1, P.W. 3 and P.W. 6 have deposed as if entire occurrence was seen by them and in their presence the deceased was firstly abused, chased and he was given shot of firing which led to his death. It has been argued that many



facts which they deposed during the trial were not stated during investigation in their statement recorded under Section 161 of the Cr.P.C. He further submits that had it been a case that P.W. 1 , P.W. 5 and P.W. 6 had seen the occurrence, there was no reason in not recording their statement under Section 161 of the Cr.P.C. immediately after the occurrence, whereas in this case statement of P.W. 1 was recorded on 18/11/2009 however occurrence in the case had taken place on 28.10.2009. Similarly statement of P.W. 5 was recorded almost about six or seven days from the date of occurrence. According to Sri Thakur had they been eye witness to the occurrence and also brothers of the deceased, in normal course, they would have immediately made statement before the Police showing involvement of the appellant. He has further argued that though informant - P.W. 6 (Shailesh Kumar), who is nephew of the deceased and informant of the case, claimed to be eye witness to the occurrence, his presence was not noticed at initial stage of the investigation by the Investigating Officer. According to Sri Thakur had P.W. 6 seen the occurrence it was expected that he would have become witness either to the inquest report or his presence would have



been shown while Police after recording *fardbyan* had visited the place of occurrence. In any event it has been argued that it was quite improbable that at least three witnesses claiming to be eye witness would have deposed in such consistent manner. This creates doubt regarding their presence and witnessing the occurrence.

8. Sri Ajay Thakur, learned counsel for the appellant has further argued that it appears that deceased himself was a muscle man and he was having animosity with others and there was possibility that he might had been killed by some other person and since there was animosity with the appellant's side, appellant and his other caste members were implicated as accused in the present case. He further submits that it is the case of the prosecution that firstly deceased was abused by the appellant and others and while he started fleeing away shot of firing was given. It is not the case of prosecution witnesses that appellant gave shot of firing from close range whereas post mortem examination report is specific on the point as if the deceased was given shot of firing from a very close range. This is the reason that *tatooing* and blackening was noticed by the doctor who conducted post mortem



examination on the person of the deceased. He further submits that if for the time being it is assumed that deceased while fleeing away was shot from behind, the medical evidence does not corroborate the same. He submits that had it been a case of firing from back side, entry wound would have been on the back side whereas entry wound is at different place which is evident from the post mortem report. He further submits that of -course number of witnesses have come forward as hearsay witness but none of those witnesses have disclosed the name or source from whom they got information regarding the occurrence and as such their evidence is not admissible in the eye of law. Sri Thakur has further argued that as per prosecution case along with the appellant other four associates were there however regarding other accused persons the prosecution has not whispered. This also creates doubt on the prosecution case Accordingly, it has been argued that judgment of conviction and sentence is liable to be set aside.

9. Sri Ajay Mishra, learned Additional Public Prosecutor opposing the appeal has argued that the evidence of P.W. 6 /Shailesh Kumar may not be seen with any doubt. In his evidence he is very much categorical as to how he saw the



occurrence and the injured was carried to hospital however on way to hospital he died.

10. Besides hearing learned counsel for the parties, we have minutely examined entire evidence on record and after going through the same *prima facie* we are of opinion that prosecution has not been able to establish its case beyond all reasonable doubts. However before proceeding, it would be necessary to cursorily examine the evidence on record.

11. P.W. 6 -Shailesh Kumar, who is informant has been examined as eye witness to the occurrence. In his evidence he has almost reiterated the fact disclosed in the *fardbyan*. He deposed that near the house of Bal Krishna Modi (not examined) occurrence had taken place. This witness in paragraph 3 of his examination in chief has come out with a case that entire occurrence was seen by Upendra Prasad (P.W. 1), Jatan Prasad (P.W. 5), Harendra Prasad (P.W. 2), Sanjeet Kumar (P.W. 4), Ajay Kumar (P.W. 3) however on examination of the evidence of P.W. 2 it is evident that he has been examined as only hearsay witness. P.W. 3 has come out as if he was seizure list witness. P.W. 4 -Sanjeet Kumar in his evidence has not claimed as eye witness to the occurrence



rather he has introduced a story as if after the occurrence while he reached near the injured, the injured disclosed the name of the appellant as assailant and he introduced the theory of oral dying declaration and he has taken U -turn on the point of being eye witness to the occurrence. P.W. 1 (Upendra Prasad) and P.W. 5 -Jatan Prasad @ Jatan Yadav both were own brothers of the deceased and they too have deposed like P.W. 6- Shailesh Kumar (informant of the case). On examination of evidence of P.W. 1, P.W. 5 and P.W. 6 it appears that their evidence is parrot type which creates doubt on their evidence as eye witness. P.W. 2 - Harendra Prasad was also introduced by the informant -P.W. 6 as eye witness to the occurrence however in the *fardbyan* though informant has given name of other witnesses, he has not named P.W. 2 as witness to the occurrence. So in the case material witnesses are P.W. 1, P.W. 2, P.W. 5 and P.W. 6 who are non else but either brothers, son or nephew of the deceased. In the case none of the independent witnesses have come forward claiming to be eye witness to the occurrence. P.W. 7 -Rajesh Paswan was examined as hearsay witness however in his evidence he has not divulged the name of the source from



whom he got information. Similar is the evidence of P.W. 13 - Nageshwar Prasad and P.W. 14 - Ranjeet Gope (cousin brother of the deceased) and as such their evidence may not be relied upon. So far evidence of P.W. 11 - Mithilesh Prasad is concerned who was *Foofa* of the deceased and has been examined as hearsay witness is concerned, he too has not stated as to from whom he got information however besides hearsay witness, which is not admissible in the evidence, he has proved his signature on the *fardbyan* which is marked as Ext. 4 and he also proved signature of Sanjeet Kumar and his own signature on the seizure list relating to woolen shawl and blood soaked soil, which were marked as Ext. 5/1 & 5 respectively. The doctor who conducted post mortem examination i.e. Dr. Shrikant Prasad has been examined as P.W. 16. On 29/10/2009 he was posted as Medical Officer in Sadar Hospital, Bihar Sharif and on the same day he conducted post mortem examination on the dead body of the deceased and noticed the following facts:-

“I. Lacerated wound $\frac{1}{2}$ inch x $\frac{1}{2}$ inch x cavity deep inverted margin. Skin surrounding wound, tattooing present up to 3 inch diameter (entry wound) it was present as Xth intercostal space. 2 inch lateral to vertebra.

II. Lacerated wound $\frac{3}{4}$ inch x $\frac{3}{4}$ inch x cavity deep margin everted protruding intestine



though it is at mid point between umbilicus and xiphisternum of exit wound.

2. On dissection brain and meninges pale and intact. Chest cavity -heart both chamber empty, lungs pale and intact IXth and Xth right rib fractured 1 inch lateral to vertebral end. Abdomen cavity on proving wound No. 1 was communicating with wound no. 2. Abdominal cavity filled with blood and blood clots. Liver ruptured. Stomach perforated. Stomach contents – Nil. Other abdominal viscera pale and intact. Urinary bladder empty. Cause of death- in my opinion haemorrhagic shock due to fire arm injury. Time elapsed since death 6 to 36 hours.”

He proved the post mortem examination report which was in his writing and signature and the same was marked as Ext. 9. On examination of the evidence of P.W. 16 as well as post mortem examination report it is evident that entry wound was having *tattooing* mark suggesting that firing was made from a very close range. However in the evidence of either of the prosecution witnesses it has not come that firing was made from close range and as such medical evidence does not corroborate the prosecution case.

12. The Investigating Officer - Krishna Prasad has been examined as P.W. 15. In his evidence he proved the *fardbyan*, which was marked as Ext. 5/2, inquest report (Ext. 6), production cum seizure list in respect of damaged projectile (Ext. 7), seizure list relating to seizure of blood soaked soil and Shawl of the deceased (Ext. 8). In his



evidence he stated that on 28.10.2009 at 3.00 P.M. he was within the area of Karai Police Station along with the Armed Forces and he was moving under the leadership of Officer-in-charge for conducting raid. At 17.15 Hours (i.e. 5.15 P.M.) he got information that in Sandh village one person was given fire arm injury who was carried to hospital. After getting this information this witness reached the village -Sandh where he got information that Lallu Gope, son of Ram Briksh Gope had received fire arm injury and injured, for his treatment, was carried to P.M.C.H. by the family members. Subsequently he also got information that the injured succumbed to his injuries on way and thereafter the family members were bringing the dead body to Police Station. Thereafter this witness went to Police Station. On the same day i.e. 28.10.2009 at 9.00 in the night Shailesh Kumar (P.W. 6), Mithilesh Prasad (P.W. 11) and Sanjeet Kumar (P.W. 4) brought dead body of the deceased and thereafter he recorded *fardbyan* of Shailesh Kumar (P.W. 6). After recording *fardbyan* which was recorded in the Police Station inquest report was prepared and thereafter he visited the place of occurrence. In paragraph 9 of his evidence he has described regarding the place of occurrence which was near



the house of Bal Krishna Modi. Then he deposed that he recorded statement of witnesses. In paragraph 16 of his examination in chief he stated that on 18.11.2009 he recorded statement of P.W. 2 (Harendra Prasad), P.W. 1 (Upendra Prasad), P.W. 9 (Samu Paswan), P.W. 10 (Devranjan @ Premranjan), P.W. 12 (Mahendra Paswan). Out of those witnesses during evidence P.W. 1 & P.W. 2 Upendra Prasad and Harendra Prasad have been examined as if they had seen the occurrence and in their presence occurrence had taken place. It is surprising that though P.W. 1 (brother of the deceased) and P.W. 2 (son of the deceased) were eye witnesses to the occurrence their statement was recorded after twenty days from the occurrence. In the case occurrence had taken place on 28.10.2009 whereas their statement was recorded under Section 161 of the Cr.P.C. on 18.11.2009. This also creates doubt in the mind of the court regarding their genuineness. While P.W. 1 and P.W. 2 were examined their attention to their previous statement was drawn and also corroboration was made in the evidence of P.W. 15 (Investigating Officer) in which it has come that they were examined as witness during investigation as hearsay witness



but during the trial they had come out as if they were eye witness to the occurrence. Though this witness was given suggestion that deceased was having criminal antecedent but same was not specifically denied rather this witness stated that he was not recollecting as to whether he (deceased) was having criminal antecedent or not. In the evidence in paragraph 16 of P.W. 15 it has come that he submitted charge sheet against the appellant but in his entire evidence it has not come as to what happened in respect of other accused persons. On examination of evidence of P.W. 15 one thing is clear that while he had proceeded for conducting search in an another case he got information at 5.15 i.e. within 15 minutes after the occurrence that in the village -Sandh some one had received fire arm injuries. Thereafter he rushed to the village and in village he got information as to who was injured and it was fire arm injury and he was also knowing the name of the father of the deceased but nothing has been indicated as to who were the culprits. This witness has stated that at the place of occurrence itself in the village he had got information that injured was carried to P.M.C.H. and immediately he states that he got information that injured had died and injured is being



brought back to Police Station it is surprising that till then he had not received any information regarding the culprits. Had it been a case of witnessing the occurrence in which the appellant was involved in village after arrival the Investigating Officer would have certainly received information regarding involvement of the appellant. Non mentioning of the name of the appellant by P.W. 15 in the village itself creates serious doubt on the prosecution case. The court is in agreement with the submission of learned counsel for the appellant that it appears that first version was suppressed by the prosecution otherwise of- course number of other witnesses have come forward to depose but it has been noticed that most of the witnesses were examined as hearsay witnesses but in their evidence they have not disclosed the source of information and as such their evidence as hearsay may not be admissible in the eye of law.

13. On examining entire material as well as ocular evidence *vis a vis* medical evidence the court is of opinion that there is no consistency in between oral and medical evidence. It is true that in case of inconsistency in between oral evidence and medical evidence reliance is to be placed on oral evidence



but for placing such reliance it is condition precedent that such oral evidence must be credible. In the facts and circumstances of the present case though the Investigating Officer at the first instance got information regarding fire arm injury given to Lallu Gope with his parentage, non mentioning of the name of culprits creates doubt on the prosecution case and as such on the basis of such oral evidence the medical evidence which goes against the prosecution case is required to be placed much reliance than such incredible oral evidence. On perusal of evidence in paragraph 17, 18 and 19 of cross examination of the P.W. 6 his presence at the place of occurrence appears to be doubtful.

14. In view of the facts and circumstances, we are of opinion that prosecution has not been able to establish its case beyond all reasonable doubts. Accordingly, by way of extending benefit of doubt the judgment of conviction and order of sentence dated- 18.07.2013 and 19.07.2013 respectively passed by learned 1st Additional Sessions Judge, Hilsa, Nalanda in Sessions Trial No. 670 of 2010 [arising out of Hilsa (Karai Parsurai) P.S. Case No. 402 of 2009] is hereby set aside and appellant is acquitted from all the charges. Since



appellant is in custody and judgment of his conviction has been set aside, it is directed to release him forthwith, if not wanted in any other case.

15. The appeal is allowed.

(Rakesh Kumar, J)

(Anil Kumar Sinha, J)

praful/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	27-04 -2019
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