

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.646 of 2016

Arising Out of PS. Case No.-264 Year-2004 Thana- SIDHWALIYA District- Gopalganj

Yogendra Ram Son of Late Naga Ram, Resident of Village- Jhajhwa, P.S-
Sidhwalia, District- Gopalganj,

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Naresh Prasad, Adv. Mr. Ranjeet Kumar Pandey, Adv.
For the Respondent/s	:	Mr. Bipin Kumar, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

21-11-2019

Vide judgment of conviction dated 27.07.2016

and order of sentence dated 28.07.2016 passed by Additional Sessions Judge- VIII, Gopalganj in Sessions Trial No. 400/2005 arising out of Sidhwaliya PS Case No. 264/04, appellant, Yogendra Ram has been found guilty for an offence punishable under Section 328 IPC and sentenced to undergo RI for eight years as well as to pay fine of Rs. 10,000/- in default thereof, to undergo SI for six months additionally, under Section 304 of the IPC and sentenced to undergo RI for eight years as well as to pay fine of Rs. 10,000/- in default thereof, to undergo SI for six months, additionally, with a further direction to run the sentences concurrently.

2. Bideshi Manjhi, Chowkidar (PW-12) gave



his Fardbeyan on 07.12.2004 disclosing therein that he came to know that his co-villager, Guddu Sharma had gone to the toddy shop of Yogendra Ram, (appellant) where he consumed wine three days ago. It has further been disclosed that Yogendra had brought spirit from a tanker which had turned turtle and, the aforesaid unrectified spirit was provided by Yogendra to Guddu Sharma and others, as a result of which, Guddu had been taken to Sadar Hospital, Gopalganj where he died. It has also been disclosed that on account of consuming spirit at the place of Yogendra, so many persons are suffering from chronic ailment including that of Sanjay Ram, Chandrama Manjhi. Furthermore, it has also been disclosed that the death of Baliram and others had also taken place on account of consumption of aforesaid unrectified spirit.

3. After registration of Sidhwaliya PS Case No. 264/04, investigation commenced and concluded by way of submission of charge-sheet, facilitating the trial, meeting with ultimate result, subject matter of challenge under the present appeal.

4. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial of occurrence so alleged.



However, nothing has been adduced in defence.

5. Altogether thirteen PWs have been examined on behalf of prosecution in order to substantiate its case who are PW-1, Sanjay Ram, PW-2, Chandrama Manjhi, PW-3, Ashok Kumar Prasad, PW-4, Kunti Devi, PW-5, Gayatri Kunwar, PW-6, Thikedar Sharma, PW-7, Ganesh Ram, PW-8, Byas Manjhi, PW-9, Bhola Sharma, PW-10, Mahabir Prasad, PW-11, Aitwariya Devi, PW-12, Bidesh Manjhi, PW-13, Jai Prakash Singh. Side by side has also exhibited Ext-1, Formal FIR, Ext-2 Inquest report of deceased, Guddu Sharma, Ext-3, Fardbeyan of Gayatri Devi, Ext-4, Signature of I.O., Ext-5, Case diary of Sidhwaliya PS Case No. 264/04. As stated above, nothing has been adduced on behalf of defence.

6. Learned counsel for the appellant, while assailing the judgment impugned, has submitted that the findings so recorded by the learned lower court, happens to be unsustainable in the eye of law as (A) neither the treating doctor has been examined nor the doctor who conducted the postmortem report over the dead body of alleged deceased, has been examined. That being so, due to their non examination, lacks a connectivity in between the action so alleged at the end of the appellant by way of providing spurious wine to the



alleged victim and ultimate result, (B) there happens to be inordinate delay in institution of the case without any cogent explanation at the end of the Chowkidar, PW-12 irrespective of the fact that his son is also said to be one of the casualties, (C) neither country made wine (Daru) has been seized from the house of the appellant nor toddy, nay from the evidence of PW-13, the I.O., it is evident that the alleged P.O. was ever used as toddy shop, nor it could be said that appellant was selling spurious wine as nothing was seized therefrom, (D) the evidence of witnesses are inconsistent to each other to such extent that probability, possibility of self consuming the spurious wine/unrectified spirit on account of accident of a tanker laden with spirit is found duly surfaced and, victimization of the appellant on one pretext or another. That being so, the judgment impugned is fit to be set aside.

7. Learned APP, while controverting the submissions having been made on behalf of learned counsel for the appellant has submitted that from the evidence available on the record, it is apparent that the same fully supports the findings so rendered by the learned lower court. Consequent thereupon, the instant appeal appears to be devoid of merit and is fit to be dismissed.



8. Appellant has been found guilty for an offence punishable under Section 328 as well as 304 IPC. 304 IPC is applicable only on the score when the ingredients, so coming out from the materials available on the record, did justify the exceptions having so prescribed under Section 300 of the CrPC. That means to say, there should be positive as well as concrete evidence to inter-connect the action with resultant leading to culpable homicide not amounting to murder.

9. From the record it also appears that treating doctor has not been examined. In likewise manner, the doctor, who conducted postmortem, has also not been examined. So, the cause of death is not known. Whether death was on account of consumption of spurious wine, the prosecution has been expected to substantiate but, as is evident, appears to be deficient one. Apart from this, it is evident from the format of charge that the same was levelled against the appellant concerning Guddu Sharma alone. From the inquest report, it is evident that no injury has been found over the person of the deceased. So, due to non-examination of treating doctor, it has become difficult to accept that Guddu Sharma was admitted at hospital on account of consumption of spurious wine, in likewise manner, he died, on account thereof, is also found



unconnected. Furthermore, it is manifest that during course of investigation, I.O. received Fardbeyan of Gayatri Devi (PW-6), found barred by Section 162 of the CrPC, even also does not suggest any kind of allegation against the appellant. PWs-4, 5, 6 had not named the appellant at whose place, Guddu Sharma had gone, consumed spurious wine and consequent thereupon, he died. PWs-1 and 2 are the persons who consumed wine at the place of appellant but, they have not named Guddu to be one of the drunkards. PW-7, 8 are hearsay witnesses but, during course of cross-examination, PW-8 who happens to be son of the informant, and further from para-7 of cross-examination, it is evident that his brother, Kanhaiya Manjhi also died on account of consuming spurious wine suggests otherwise when his cross-examination recorded at para-11 is properly appreciated whereunder, he has stated that he had seen the appellant mixing poison. He had informed the police over which, action was taken. Then has stated that he had informed the police on the date of occurrence itself. PW-11 is also not an eyewitness rather, he in hearsay manner stated that his son, Baliram had died on account of consuming spurious wine provided by the appellant.

10. PW-12 is the informant. Admittedly, he himself is not an eyewitness to the occurrence and so, the



prosecution followed conviction and sentence with regard to Section 304 IPC is not at all found to be appropriate in the background of deficiency so persisting as pointed out hereinabove.

11. That being so, conviction of the appellant to that extent is set aside and to that extent, appeal is allowed.

12. Now coming to the finding relating to Section 328 IPC, first of all, the infirmity persisting on the record should be seen. From the format of charge, it transpires that irrespective of the fact that there happens to be sufficient material available on the record since before identifying different victim at hooch charge under Section 328 IPC has also been framed relating to Guddu Sharma only which ought not to be. However, the same is found properly cared with by Section 215 read with Section 464 of the CrPC. Moreover, from the record, it is apparent that there happens to be proper disclosure by the concerned witness claiming himself to be the victim, whereupon been charge-sheet witness, the statement thereof, might have been supplied to the appellant/accused in compliance of Section 207 of the CrPC and so, the appellant was fully conversant therewith and in the aforesaid background, it could not be said that interest of appellant has been prejudiced



on account of such error/omission.

13. PWs-1 and 2 are the two such witness who have claimed themselves to have consumed the spurious wine at the place of appellant and, faced the consequence. PW-1 has said that the occurrence is of more than three years. It was 6:30 PM. He had gone to the place of appellant to take '*Daru*' where, he found Ram Chandra, Kanhaiya, Baliram and Guddu taking *Daru* since before. He also took one glass. Just after taking *Daru*, he felt unwell and for that, he was treated. Due to timely treatment, he recovered but eyesight of both eyes got lost. Other four persons died on account thereof. Accused is his co-villager and so, identifies him. At the present moment, he is unable to see. At the time of taking *Daru*, it was smelling like K-oil. During cross-examination, he has stated at para-2 that Bideshi Manjhi (informant) happens to be father of Kanhaiya. He was treated at Sadar Hospital, Gopalganj. He is not remembering the exact date on which, his statement was recorded by the police, when he returned back from the hospital, his statement was recorded. He was mason engaged at Lucknow before the occurrence. He had come a month prior to the occurrence, on the eve of Diwali. In para-3, he has stated that he is not knowing whether the tanker full of spirit turned turtle over the road. He



had gone to load sugarcane at the field of Nand Kishore. He returned in the evening. He has stated before the police that when he had gone to take Daru, at that very time, Ram Chandra, Kanhaiya, Baliram and Bhuttu were present who were drinking since before. The aforesaid paragraph has got no relevancy as the same has not been confronted to the I.O., PW-13. Then has said that his house and the house of Yogendra is intervened by three houses, that of Dashrath Ram, Rajendra Ram and Bhutai Ram. He does not know Bhuttu. Then he denied the suggestion that whatever evidence, he has given is based upon an information given by the people without having any personal knowledge. He has denied the suggestion that his eyesight has been lost at the Lucknow itself and, only to pressurize upon the appellant to pay, such allegation has been attributed.

14. PW-2 is another victim who has stated that occurrence is about three years ago. It was 6:00 PM. He was at his house. He had gone to the place of the appellant where *Daru* was being sold. He had consumed one glass of *Daru*. Soon thereafter, he felt uneasiness. Then thereafter, he was taken to the doctor treated and then got himself cured. He has further stated that he is not knowing whether anybody has died on account of consuming liquor at the place of appellant. Identified



the accused. During cross-examination at para-2, he has stated that his village and the village of Yogendra Ram is intervened by a road. Jhanjhwa lies east to the road while Madhopur west. He has further stated that he has got no information with regard to meeting with accident of a tanker full of spirit. Then has stated that he is knowing full well regarding appellant being a toddy seller. At that very time, he used to take toddy as well as Daru. He had not taken toddy at the place of Yogendra since before the occurrence. So many persons were also engaged in selling toddy such as Pravesh Ram, Baristar Rai, Suresh Rai etc. He knew that whoever sells toddy also sells Daru. Then he denied the suggestion that he is also engaged in similar trade. Then he denied the suggestion that Yogendra used to sell toddy without paying a single farthing to the police station causing loss to him, on account thereof, they have falsely implicated the accused. He has further stated that he was treated at the clinic of Dr. Jainarayan but he has got no document therewith. Then he denied the suggestion that no occurrence, as deposed by him, took place. Also denied the suggestion that he is also engaged in selling of Daru and, on account thereof, got the accused implicated in this case, in order to taken revenge.

15. PW-3 is a formal witness and likewise is the



status of PW-10. PW-9 has not supported the case of the prosecution, on account thereof, has been declared hostile. PWs-4, 5 and 6 are connected with Guddu and during course of their evidence, they have not alleged anything against the appellant.

16. PW-7 is a hearsay witness who has stated that Yogendra Ram prepared spurious wine after taking out spirit from the tanker which turned turtle on account of accident and, provided the same to the villagers, as a result of which, so many persons including that of Kanhaiya, Bhuttu, Ramashray, Ramchandra, Baliram and Sanjay died and others also developed different kinds of complications. Eyesight of Sanjay is found lost. Identified the accused. In para-5, during course of cross-examination, he has stated that Yogendra was engaged in business for the last one year. His uncle Bideshi was well versed with the same. He denied the suggestion that accused was regularly paying undue amount to Bideshi Manjhi whereupon, he did not inform the police. When he refused to pay the amount furthermore, then in that event, accused has been implicated in this case with a false and frivolous allegation. Then he denied the suggestion that no such kind of occurrence had ever taken place.

17. More or less, PW-8 has spoken in the same



way. PW-11 has stated that on account of consuming Daru at the place of Yogendra, her son, Baliram died. Identified the accused. During cross-examination at para-2, she has stated that Yogendra has got one shop. She has further stated that the house of Yogendra lies at different village. She has further stated that her son was not accustomed to wine. Baliram was unconscious. She took him to the hospital. At that very time, Baliram was not in a position to identify her. Then she denied the suggestion that she has deposed on the basis of hearsay.

18. PW-12 is the informant. He has stated that the occurrence is of about five years ago. Yogendra had brought wine from the tanker which turned turtle at village, Gopalpur and he offered the same to the villagers who have gone to his place to drink and, after consuming the same, Guddu, Ramchandra, Baliram and Kanhaiya died. He had gone to the police station where he gave his Fardbeyan, read over to him and finding it correct, he put his LTI. Identified. During cross-examination at para-2, he has stated that earlier, he has got no information with regard to accident of a tanker as, on that very day, he was at the police station. In para-3, he has stated that tanker met with an accident about 4-5 days prior to the occurrence. After coming to know about the same, he had also



informed the police station. Though the Chowkidar of Mohammadpur was deputed just two hours after the accident. He had also gone to the place of accident after two days. He has denied the suggestion that it was the Chowkidar who lifted the spurious wine and sold it. At para-5, he has stated that he is unable to say name of particular person who had disclosed regarding the occurrence. Then has denied the suggestion that in order to save Chowkidar of Mohammadpur, implicated the accused with false allegation.

19. PW-13 is the I.O.. He during course of his examination-in-chief has stated that on 17.12.2004, he was posted at Sidhwaliya police station as officer-in-charge. On that day, he had recorded statement of Bideshi Manjhi, Chowkidar (exhibited the same, exhibited the formal FIR, endorsement) on the basis of which registered Sidhwaliya PS Case. He took up investigation. Recorded further statement of other witnesses. Then he had referred Sanha No. 119/07.12.2004 which was recorded on account of death of Guddu Sharma and others due to consumption of spurious wine. Proceeded towards place of occurrence. Reached at the house of Yogendra where nothing incriminating has been found. Identified the same through specific boundary. Then it has been stated by him that during



course of investigation, he received inquest report and Fardbeyan of wife of deceased, Guddu Sharma recorded by Gopalganj Town Police, which he also exhibited. Also recorded statement of other witnesses, received postmortem report of Guddu Sharma, supervision note and then, after completing investigation, submitted charge-sheet. During cross-examination, he has stated at para-9 that at that very time cases were not being instituted at Sidhawalia. He has further stated that none of the witnesses had claimed that he had seen the deceased taking wine at the house of accused. In para-10, he has stated that he had not found any kind of incriminating article suggesting sale of spurious wine by the accused from his house. He has further stated at para-11 that for the first time, he got information regarding the occurrence on 07.12.2004 through registration of FIR. At para-12, he has stated that though witnesses have stated that deceased took wine at the place of Yogendra, eyesight of Sanjay got lost but, he had not got the Sanjay examined by the doctor. He has further stated that he had not sent the viscera for chemical examination. Then has denied the suggestion that his investigation happens to be a collusive one.

20. After going through the evidences of PWs-1



and 2, it is apparent that they both have not been tested over the factual aspect which they claimed positively that they consumed Daru at the place of Yogendra, thereafter, they felt uneasiness. PW-1 claimed to have been treated at Gopalganj, PW-2 by one Dr. Jainarayan. PW-2 has not said anything furthermore while PW-1 has stated that on account of consuming of spurious wine, he lost his eyesight and from the suggestion having given to PW-1, it is admitted at the end of appellant that he has lost his eyesight but, with an explanation that he lost it at Lucknow. During course of defence, nothing has been adduced at the end of appellant nor even I.O. has been suggested. Furthermore, neither PW-1 nor PW-2 has been cross-examined on that very score, that means to say, over consumption of wine at the place of accused, Yogendra.

21. The effect of non cross-examination of a witness on material aspect has been properly considered by the Hon'ble Apex Court in the case of *in Gian Chand & others v. State of Haryana reported in 2013(4) PLJR 7 (SC)* it has been held:-

11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in *Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors.*, AIR 2013 SC 1204 observing as under:



“31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.”

22. With regard to constitution of Section 328 IPC, the following ingredients are to be fulfilled at the end of prosecution:-

(a) that the substance in question is a poison



or any stupefying, intoxicating or unwholesome drug etc,

(b) that the accused administered the substance to the complainant or caused the complainant to take such substance

(c) that he did as above with an intent to cause hurt or knowing it to be likely that he would thereby cause hurt or that the accused intended to commit or facilitate the commission of an offence.

23. From the evidence available on the record, it is crystal clear that accused was knowing since before that wine which he was selling was spurious one as the accused has not contradicted the same by way of cross-examination, by way of adducing defence. Furthermore, there happens to be admission at the end of appellant that he was actively engaged in selling the wine but without license as the appellant failed to produce license issued by the Excise Department.

24. That being so, appellant was fully knowing since before that spurious wine happens to be injurious to the health and even knowing the same or was within his full knowledge, he offered the same and, on consumption, although there happens to be no positive evidence relating to PW-2 but so far PW-1 is concerned, that is found duly substantiated, even by way of suggestion, irrespective of the fact that during course of investigation, nothing incriminating has been found from the



place of the appellant which was but natural as FIR was registered after a long delay being sufficient to the appellant to get the evidence decadenced .

25. Consequent thereupon, the finding so rendered by the learned lower court with regard to Section 328 IPC is hereby, affirmed. Furthermore, the sentence so inflicted by the learned lower court relating thereto, is also hereby, confirmed. Hence, appeal to that extent is dismissed.

26. Appellant, who is under custody, will remain till saturation of the period of sentence.

(Aditya Kumar Trivedi, J)

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